Supreme Court, U. S.
FILED
JUN 19 1975
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-1599

JEWELL D. CHANDLER, *Petitioner*,

v.

DONALD E. JOHNSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. HAROLD FLANNERY
JOEL L. SELIG
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
733 Fifteenth Street, N.W.
Suite 520
Washington, D. C. 20005

STUART P. HERMAN
9601 Wilshire Boulevard
Suite 632
Beverly Hills, California 90210

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	7
I. The Decision Below Is in Conflict with the Third Circuit's Decision in *Sperling* v. *United States*, and Numerous Other Decisions Are in Conflict on the Important Issue Which Is Presented	9
II. The Decision Below Is in Conflict with Principles Established by Decisions of This Court	17
III. The Decision Below Is Inconsistent with the Language and Purpose of the 1972 Amendments to Title VII	21
CONCLUSION	34
APPENDIX	1a
Complaints Examiner's Findings and Recommended Decision	1a
Veterans Administration Decision	18a
Civil Service Commission Decision	21a
Opinion of the District Court	30a
Opinion of the Court of Appeals	34a
Opinion of the Third Circuit in *Sperling* v. *United States*	42a
Opinion of the Tenth Circuit in *Salone* v. *United States*	82a

CASES: Page

Abrams v. *Johnson*, 7 [CCH] EPD ¶9380, 9 [BNA] FEP Cas. 107 (N.D. Ohio 1974) 11
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).. 8, 18, 19, 20
Allen v. *Crosby*, 8 FEP Cas. 528 (E.D. Pa. 1973) 17
Allen v. *Veterans Administration*, 8 EPD ¶9783, 10 FEP Cas. 195 (W.D. Pa. 1974) 11
Baca v. *Butz*, 376 F.Supp. 1005 (D. N.M. 1974) 11
Bernardi v. *Butz*, 7 EPD ¶9381, 8 FEP Cas. 479 (N.D. Cal. 1974) 11
Boston v. *Naval Station, Norfolk, Virginia*, 10 FEP Cas. 649 (E.D. Va. 1974) 10
Brooks v. *Lynn*, 10 FEP Cas. 638 (W.D. Okla. 1974).. 11
Butler v. *Kleppe*, 9 EPD ¶10,054, 10 FEP Cas. 869 (D.D.C. 1975) 12
Caro v. *Schultz*, 9 EPD ¶9987 (N.D. Ill. 1974), *appeal pending*, 7th Cir. No. 74-1728 11
Carreathers v. *Alexander*, 7 EPD ¶9379 (D.Colo. 1974) 10
Carreathers v. *Alexander*, 9 EPD ¶9858 (D.Colo. 1974) 10, 11
Cates v. *Johnson*, 377 F.Supp. 1145 (W.D. Pa. 1974), *appeal pending*, 3rd Cir. No. 74-2079 .....10, 14
Chandler v. *Johnson*, —— F.2d ——, 9 EPD ¶10,123, 10 FEP Cas. 689 (9th Cir. 1975) 1, 34a-41a
Chandler v. *Johnson*, 7 EPD ¶9139, 7 FEP Cas. 266 (C.D. Cal. 1973) 1, 30a-33a
Coopersmith v. *Johnson*, 7 EPD ¶9388, 10 FEP Cas. 627 (D.D.C. 1974) 12
Day v. *Weinberger*, 8 EPD ¶9646 (D.D.C. 1974) 15
Day v. *Weinberger*, 8 EPD ¶9771 (D.D.C. 1974) 15
Eastland v. *Tennessee Valley Authority*, 9 EPD ¶9927 (N.D. Ala. 1975), *appeal pending*, 5th Cir. No. 75-1855 ..... 11, 16
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973) 18
Ettinger v. *Johnson*, 10 FEP Cas. 642 (E.D. Pa. 1974), *appeal pending*, (3rd Cir. No. 74-2171) 11

Page

Evans v. *Johnson*, 7 EPD ¶9351, 8 FEP Cas. 1013 (C.D. Cal. 1974) 11
Ficklin v. *Sabatini*, 8 EPD ¶9829, 9 FEP Cas. 70 (E.D. Pa. 1974) 11, 16
Fisher v. *Brennan*, 10 FEP Cas. 685 (E.D. Tenn. 1974) 11, 14
Foster v. *U. S. Civil Service Commission*, 9 EPD ¶9887, 10 FEP Cas. 756 (S.D. Tex. 1974) 10
Gautier v. *Weinberger*, 6 EPD ¶9001, 7 FEP Cas. 473 (D.D.C. 1973) 12
Griffin v. *U. S. Postal Service*, 385 F.Supp. 274 (M.D. Fla. 1973) 10
Guilday v. *U. S. Department of Justice*, 385 F.Supp. 1096 (D.Del. 1974) 11
Hackley v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973), *appeal pending*, D.C. Cir. No. 73-2072 .. 5, 11, 12, 13, 30
Haire v. *Callaway*, 9 FEP Cas. 168 (E.D. Mo. 1974) .. 11
Handy v. *Gayler*, 364 F.Supp. 676 (D.Md. 1973) 11, 14
Henderson v. *Defense Contract Administration Services Region, New York*, 370 F.Supp. 180 (S.D.N.Y. 1973) 10
Hill v. *Seamens*, 9 EPD ¶10,095, 10 FEP Cas. 756 (S.D. Tex. 1975) 10
Hockett v. *Administrator of Veterans Affairs*, 385 F. Supp. 1106 (N.D. Ohio 1974) 11
Hunt v. *Schlesinger*, 9 EPD ¶10,024, 10 FEP Cas. 52 (W.D. Tenn. 1974) 10
Jackson v. *U. S. Civil Service Commission*, 379 F.Supp. 589 (S.D. Tex. 1973) 10, 15
Johnson v. *U. S. Postal Service*, 364 F.Supp. 37 (N.D. Fla. 1973), *aff'd per curiam*, 497 F.2d 128 (5th Cir. 1974) 11
Leinster v. *Engman*, 8 EPD ¶9774, 10 FEP Cas. 614 (D.D.C. 1974) 12
Levens v. *General Services Administration*, 9 EPD ¶10,153, 10 FEP Cas. 493 (W.D. Mo. 1975) 10

Page

Marshall v. *U.S. Highway Administrator*, 7 EPD ¶9814, 10 FEP Cas. 559 (D.D.C. 1973) 12
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 8, 18, 25
McGowan v. *U.S. Information Agency*, 8 EPD ¶9787, 10 FEP Cas. 618 (D.D.C. 1974) 12, 14
McLaughlin v. *Callaway*, 382 F.Supp. 885 (S.D. Ala. 1974) 11
McLaughlin v. *Callaway*, 9 EPD ¶10,098 (S.D. Ala. 1975) 15
Moody v. *Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973), *cert. granted*, 95 S.Ct. 654 (1974) 17
Morton v. *Mancari*, 94 S.Ct. 2474 (1974) 8, 19, 27
Nimitz v. *Berzak*, 7 EPD ¶9273 (E.D. La. 1974) 11, 14
Pendleton v. *Schlesinger*, 8 EPD ¶9598, 8 FEP Cas. 853 (D.D.C. 1974), *appeal pending*, D.C. Cir. No. 74-1929 ..... 12, 16
Pointer v. *Sampson*, 62 F.R.D. 689, 7 EPD ¶9326, 7 FEP Cas. 905 (D.D.C. 1974), *appeal pending*, D.C. Cir. No. 73-1397 ..... 12, 16
Reynolds v. *Wise*, 375 F.Supp. 145 (N.D. Tex. 1973-4). 10, 15, 30
Richerson v. *Fargo*, 61 F.R.D. 641, 7 EPD ¶9310, 7 FEP Cas. 488 (E.D. Pa. 1974), *vacated*, 64 F.R.D. 393, 8 EPD ¶9751, 10 FEP Cas. 644 (E.D. Pa. 1974) 17
Richerson v. *Fargo*, 64 F.R.D. 393, 8 EPD ¶9751, 10 FEP Cas. 644 (E.D. Pa. 1974), 10 FEP Cas. 862 (E.D. Pa. 1975) 10, 16
Roberts v. *Mumford*, 8 EPD ¶9692, 8 FEP Cas. 1195 (D.D.C. 1974) 12, 14
Robinson v. *Klassen*, 9 EPD ¶9954, 9 FEP Cas. 84 (E.D. Ark. 1974) 10
Robinson v. *Warner*, 8 EPD ¶9452, 10 FEP Cas. 609 (D.D.C. 1974) 11, 15
Roney v. *Saxbe*, 380 F.Supp. 1191 (D.D.C. 1974) 12
Russell v. *Johnson*, 10 FEP Cas. 924 (W.D. Pa. 1975). 11

Page

Salone v. *United States*, 511 F.2d 902 (10th Cir. 1975). 8, 9, 82a-86a
Smith v. *Gunther*, 9 EPD ¶9915 (D.D.C. 1975) 12
Smith v. *Snyder*, 381 F.Supp. 1083 (E.D. Pa. 1974) ... 11
Spencer v. *Richardson*, 6 EPD ¶8906, 7 FEP Cas. 105 (D.D.C. 1973), *vacated sub nom. Spencer* v. *Schlesinger*, 374 F.Supp. 840 (D.D.C. 1974), *appeal pending*, D.C. Cir. No. 74-1787 10
Spencer v. *Schlesinger*, 374 F.Supp. 840 (D.D.C. 1974), *appeal pending*, D.C. Cir. No. 74-1787 ..... 10, 12, 16
Sperling v. *United States*, —— F.2d ——, 9 EPD ¶10,100, 10 FEP Cas. 654 (3rd Cir. 1975) 7, 9, 16, 20, 22, 26, 27, 30, 42a-81a
Sylvester v. *U.S. Postal Service*, 10 FEP Cas. 758 (S.D. Tex. 1975) 10, 17
Thomas v. *Department of State*, 8 EPD ¶9622 (D.D.C. 1974) 12
Thompson v. *McCormick*, 10 FEP Cas. 560 (D.D.C. 1974) 17
Thompson v. *U.S. Department of Justice*, 360 F.Supp. 255 (N.D. Cal. 1973) 10
Thompson v. *U.S. Department of Justice*, 372 F.Supp. 762 (N.D. Cal. 1974), *appeal pending*, 9th Cir. No. 74-1847 ..... 10, 11
Tomlin v. *Air Force Medical Center*, 369 F.Supp. 353 (S.D. Ohio 1974) 11, 14
Wormley v. *Department of the Navy*, 9 EPD ¶10,015, 8 FEP Cas. 1008 (N.D. Cal. 1974) 11

STATUTES:

28 U.S.C. § 1254(1) 2

Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, *et seq.* ..... *passim*
42 U.S.C. § 2000e-5(f)(1) 22, 33

Page

42 U.S.C. § 2000e-5(i) 22
42 U.S.C. § 2000e-5(k) 33
42 U.S.C. § 2000e-16(a) 3
42 U.S.C. § 2000e-16(c) 2, 4, 21, 22, 23
42 U.S.C. § 2000e-16(d) 3, 21, 22, 24

ORDERS AND REGULATIONS:

5 C.F.R. Part 713, 34 Fed. Reg. 5367 (Mar. 19, 1969), as amended at 34 Fed. Reg. 14023 (Sept. 4, 1969). 27

5 C.F.R. Part 713, 37 Fed. Reg. 25699 (Dec. 2, 1972) .. 27

5 C.F.R. Part 713 (1973) 22, 32, 33
5 C.F.R. § 713.214 4
5 C.F.R. § 713.215 22
5 C.F.R. § 713.216 23
5 C.F.R. § 713.217 ..... 4, 23
5 C.F.R. § 713.218 ..... 4, 23
5 C.F.R. § 713.221 ..... 4, 23
5 C.F.R. § 713.231 ..... 4, 23
5 C.F.R. § 713.281 ..... 22, 23

LEGISATIVE HISTORY:

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971) ...27, 29

S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971) 26, 29

Senate Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972*, 92d Cong., 2d Sess. (Committee Print, 1972) [cited as *History*].. 26, 27, 29

MISCELLANEOUS:

Brief for the United States as Amicus Curiae, *Alexander* v. *Gardner-Denver Co.*, No. 72-5847, October Term, 1973 20

U.S. Civil Service Commission, *Discrimination Complaint Examiner's Handbook* (April 1973) 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

JEWELL D. CHANDLER,
Petitioner,

v.

DONALD E. JOHNSON, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Jewell D. Chandler, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this case on April 25, 1975.

OPINIONS BELOW

The opinion of the court of appeals is not officially reported. It is unofficially reported at 9 [CCH] EPD ¶ 10,123, and at 10 [BNA] FEP Cas. 689. The court of appeals' opinion is reproduced in the Appendix at pp. 34a-41a.

The opinion of the district court is not officially reported. It is unofficially reported at 7 EPD ¶ 9139, and

at 7 FEP Cas. 266. The district court's opinion is reproduced in the Appendix at pp. 30a-33a.

Also reproduced in the Appendix are the findings and recommended decision of the hearing examiner (App. 1a-17a), the decision of the Veterans Administration (App. 18a-21a), and the decision of the Civil Service Commission (App. 21a-29a).

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1975. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a plaintiff who alleges unlawful discrimination in employment by a federal agency in a suit under the 1972 amendments to Title VII of the Civil Rights Act of 1964 is entitled to a plenary judicial trial *de novo,* as opposed to a review of the record of administrative proceedings before the defendant agency?

STATUTE INVOLVED

Section 717 of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16, provides in pertinent part as follows:

> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.
>
> (d) the provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

STATEMENT

Petitioner, Jewell D. Chandler, is a black female employee of the Veterans Administration. In 1972 Ms. Chandler applied for a GS-13 Supervisory Claims Examiner position in the Division of the Los Angeles Region in which she was employed. As of October 1972, there were 16 positions above the GS-12 level in that Division, of which two were held by white females, and fourteen were held by non-black males. Of all Division employees, 38 percent were female and 25 percent were black. (App. 3a-4a).

Petitioner was designated as "highly qualified" for the position in question, and was referred, with other candidates, to the selecting official for his consideration. A non-black male was selected for the position. (App. 4a-5a).

Petitioner then filed a timely administrative complaint pursuant to 42 U.S.C. § 2000e-16(a) and 5 C.F.R.

§ 713.214, alleging that her non-selection for the position in question was due to unlawful discrimination on the basis of her race (black) and sex (female). Petitioner subsequently requested a hearing on her complaint.[1] An administrative hearing was accordingly held, at which Ms. Chandler, who is not an attorney, represented herself. The hearing examiner submitted findings and recommendations pursuant to 5 C.F.R. § 713.218(g), to the effect that petitioner *had* been discriminated against on the basis of her sex with respect to the non-selection in question, but that she had not been discriminated against on the basis of her race; and the examiner recommended that petitioner be promoted immediately and retroactively to the position in question. (App. 1a-17a).

Upon receipt of the hearing examiner's findings and recommended decision, a final decision was issued by the Veterans Administration. This decision rejected the examiner's finding of sex discrimination, accepted the finding of no race discrimination, and accordingly granted no relief. (App. 18a-21a). Petitioner then filed a timely appeal to the Civil Service Commission.[2] The Commission affirmed the Veterans Administration's decision. (App. 21a-29a). Petitioner then filed this suit pursuant to Section 717(c) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(c).

In the district court, petitioner first moved for summary judgment on the ground that the official who

[1] Such a hearing is not required, but is available at the complainant's option. 5 C.F.R. § 713.217(b).

[2] Such an appeal is not required, but is available at the complainant's option. 5 C.F.R. §§ 713.221(d), 713.231(a).

entered the Veterans Administration decision rejecting the hearing examiner's decision in petitioner's favor was, as a technical matter of delegation of authority, without authority to act in the matter. This motion was denied. Petitioner then promptly initiated discovery, filing notice of two depositions and a request for production of documents. The defendants moved for a protective order prohibiting the discovery, on the ground that discovery was impermissible because the judicial proceedings should be limited to a review of the administrative record. Petitioner opposed the motion for a protective order, asserting her right to discovery and to a plenary judicial trial *de novo*. In order to avoid deciding the issues presented in a piecemeal fashion, the district court held the question of discovery in abeyance pending (1) the filing of cross-motions for summary judgment on the basis of the administrative record, and (2) a determination by the court of the proper scope of the judicial proceedings.[3] After these motions were filed, the district court granted defendants' motion for summary judgment on the basis of the administrative record, without any pre-trial discovery and without any judicial evidentiary proceedings. The district court adopted the legal position of *Hackley* v. *Johnson,* 360 F.Supp. 1247 (D.D.C. 1973), *appeal pending,* D.C. Cir. No. 73-2072, concern-

[3] While the petitioner, pursuant to the procedure suggested by the district court, filed a cross-motion for summary judgment on the basis of the administrative record, her motion was without prejudice to her contention that she had a right to discovery and a trial *de novo*. This was clearly understood by the parties and the district court; it was at the court's request that the discovery and trial *de novo* issues were submitted simultaneously with motions for summary judgment on the administrative record. (Transcript of Proceedings, Nov. 26, 1973).

ing the nature and scope of judicial proceedings in Title VII cases against federal defendants. It then found "that the absence of discrimination is firmly established by the clear weight of the administrative record and hence plaintiff is not entitled to any relief." Apart from thus paraphrasing the *Hackley* standard for granting summary judgment in the government's favor on the basis of the administrative record, the district court's opinion did not explain or state any reasons for its finding against petitioner. (App. 30a-33a).

The court of appeals affirmed the district court's denial of petitioner's motion for summary judgment on the ground of improper delegation of reviewing authority, and affirmed the district court's denial of petitioner's cross-motion for summary judgment on the administrative record. (App. 36a-38a). This petition for certiorari does not seek review of these holdings.

The court of appeals also affirmed the district court's grant of summary judgment in the government's favor on the basis of the administrative record and its denial of a plenary judicial trial *de novo*. (App. 38a-41a). This is the issue with respect to which petitioner seeks a writ of certiorari. The court of appeals held that the district court correctly "adopted and applied the intermediate scope of inquiry expounded in *Hackley* v. *Johnson* [*supra*]," and that summary judgment in the government's favor was appropriate on the basis of the administrative record. (App. 39a-41a).[4]

[4] In ruling that a federal sector plaintiff is not entitled to a trial *de novo* as a matter of right, the court of appeals held that such a plaintiff must make a showing of necessity in his or her particular case before supplementation of the administrative record or a trial *de novo* is considered. The court then concluded that petitioner had not made such a showing of necessity. (App. 40a-41a). This conclusion by the court of appeals ignored the fact that petitioner had attempted to conduct discovery and had presented reasons why the discovery requested was necessary. In addition, while the court of appeals' opinion implies that petitioner was somehow remiss in her obligation to apprise the district court of the reasons why supplementation of the record or a trial *de novo* was necessary, in fact petitioner made her position and the reasons for it quite clear, and the procedure by which the issues were presented to the district court was the procedure which the district court itself requested. (*See* n. 3, *supra*; Transcript of Proceedings, Nov. 26, 1973).

REASONS FOR GRANTING THE WRIT

In 1972 Congress amended Title VII of the Civil Rights Act of 1964 to extend its coverage to federal government agencies. This case presents the most important issue that has arisen under the 1972 amendments in the more than three years since their enactment. That issue is whether Title VII actions against federal agencies are to be conducted in the same manner as Title VII actions against private companies, unions, employment agencies, and state and local governments: i.e., as plenary judicial proceedings. The decision below held that plenary judicial proceedings are not required, and that the district court may confine its inquiry to a review of the administrative record.

The writ of certiorari should be granted in this case to resolve conflicts among the courts of appeals and among the district courts concerning this recurring issue which has not been, but should be, settled by this Court. The Ninth Circuit's decision in the case at bar is in direct conflict with the decision of the Third Circuit in *Sperling* v. *United States,* —— F.2d ——, 9 [CCH] EPD ¶ 10,100, 10 [BNA] FEP Cas. 654 (3rd Cir. 1975) (App. 42a-81a).[5]

[5] Also in conflict with both the Third Circuit's decision in *Sper-*

The decision below sanctions a procedure for adjudicating federal sector Title VII cases that is wholly at odds with the procedure which this Court has mandated in the private sector. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974). Such a double standard as to the scope of judicial proceedings under Title VII would defeat the entire purpose behind the 1972 amendments, which was to place federal employees and applicants on a par with employees and applicants in the private sector. *Morton* v. *Mancari,* 94 S.Ct. 2474, 2480-81 (1974). Since the forum of trial "inevitably affects the scope of the substantive right to be vindicated," the decision below undermines the principle that "the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government" by the 1972 amendments. *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 56; *Morton* v. *Mancari, supra,* 94 S.Ct. at 2481.

The decision below is inconsistent with the statutory language and legislative purpose of the 1972 amendments, and with the persuasive case law, including the decision of the Third Circuit in the *Sperling* case. Review by this Court is essential to resolve this important issue, and to restore to the 1972 amendments their intended vitality.

---

ling and the Ninth Circuit's decision in the case at bar is the Tenth Circuit's decision in *Salone* v. *United States,* 511 F.2d 902 (10th Cir. 1975) (App. 82a-86a). The differences among these three court of appeals decisions are discussed *infra.* Petitioner is advised that certiorari is also to be sought in the *Salone* case. Because of the differences between the rule adopted in *Salone* and that adopted in the case at bar, it would be desirable for the Court to grant certiorari in *Salone* as well as in the case at bar, and to consider the cases together.

I

The Decision Below Is in Conflict with the Third Circuit's Decision in Sperling v. United States, and Numerous Other Decisions Are in Conflict on the Important Issue Which Is Presented

The decision below rejected petitioner's position that plenary judicial proceedings are required in federal sector Title VII cases. The court of appeals held that a plaintiff who desires that the judicial proceedings extend beyond a review of the administrative record must make a specific showing—in the present case without any prior discovery—that more than a review of the record is necessary in the circumstances of his or her particular case. This holding is in direct conflict with the Third Circuit's decision that "the Act mandates a trial *de novo* in all cases." *Sperling* v. *United States,* —— F.2d ——, 9 EPD ¶ 10,100, 10 FEP Cas. 654 (3rd Cir. 1975) (App. 74a). The Third Circuit's decision is based on an extensive analysis of the language and legislative history of the 1972 amendments, which led that court to the following conclusion:

> ". . . it was Congress' intent to provide an aggrieved federal employee with as full a panoply of procedural remedies in the district court as those afforded a private sector litigant. . . . We hold therefore that the statutory language of the Act, as well as its legislative history, indicates a right to a trial *de novo* in the district court when suit is brought by an aggrieved federal employee pursuant to § 717(c)." *Sperling* v. *United States, supra,* App. 73a-74a.

In conflict with the Third Circuit's decision are the Ninth Circuit's decision in the case at bar (App. 34a-41a), as well as the Tenth Circuit's decision in *Salone* v. *United States,* 511 F.2d 902 (10th Cir. 1975) (App. 82a-86a).

Three years of litigation over this recurring issue have also spawned a large number of conflicting decisions in the district courts. A minority of the published district court decisions are in accord with the Third Circuit's conclusions in the *Sperling* case and the position advocated by the petitioner in the case at bar.[6] A majority of the published district court decisions are in accord with either the Ninth Circuit's decision in the case at bar or the Tenth Circuit's decision in the *Salone* case.[7]

---

[6] *Second Circuit: Henderson* v. *Defense Contract Administration Services Region, New York,* 370 F.Supp. 180 (S.D. N.Y. 1973).

Fourth Circuit: Boston v. *Naval Station, Norfolk, Virginia,* 10 FEP Cas. 649, 654 (E.D. Va. 1974).

Fifth Circuit: Jackson v. *U.S. Civil Service Comm'n,* 379 F.Supp. 589 (S.D. Tex. 1973); *Griffin* v. *U.S. Postal Service,* 385 F.Supp. 274 (M.D. Fla. 1973); *Reynolds* v. *Wise,* 375 F.Supp. 145 (N.D. Tex. 1973-4); *Foster* v. *U.S. Civil Service Comm'n,* 9 EPD ¶9887, 10 FEP Cas. 756 (S.D. Tex. 1974); *Hill* v. *Seamens,* 9 EPD ¶10,095, 10 FEP Cas. 756 (S.D. Tex. 1975); *Sylvester* v. *U.S. Postal Service,* 10 FEP Cas. 758 (S.D. Tex. 1975).

Sixth Circuit: Hunt v. *Schlesinger,* 9 EPD ¶10,024, 10 FEP Cas. 52 (W.D. Tenn. 1974).

Eighth Circuit: Robinson v. *Klassen,* 9 EPD ¶9954, 9 FEP Cas. 84 (E.D. Ark. 1974); *Levens* v. *General Services Administration,* 9 EPD ¶10,153, 10 FEP Cas. 493 (W.D. Mo. 1975).

Ninth Circuit: Thompson v. *U.S. Department of Justice,* 360 F. Supp. 255 (N.D. Cal. 1973), *but see, Thompson* v. *U.S. Department of Justice,* 372 F. Supp. 762 (N.D. Cal. 1974), *appeal pending,* 9th Cir. No. 74-1847.

Tenth Circuit: Carreathers v. *Alexander,* 7 EPD ¶9379 (D. Colo. 1974); *but see, Carreathers* v. *Alexander,* 9 EPD ¶9858 (D. Colo. 1974).

District of Columbia Circuit: Spencer v. *Richardson,* 6 EPD ¶8906, 7 FEP Cas. 105 (D.D.C. 1973), *vacated sub nom Spencer* v. *Schlesinger,* 374 F.Supp. 840 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1787.

[7] *Third Circuit: Cates* v. *Johnson,* 377 F.Supp. 1145 (W.D. Pa. 1974), *appeal pending,* 3rd Cir. No. 74-2079; *Richerson* v. *Fargo,*

The decisions reaching a result contrary to that urged by petitioner and adopted by the Third Circuit

---

64 F.R.D. 393 8 EPD ¶9751, 10 FEP Cas. 644 (E.D. Pa. 1974), 10 FEP Cas. 862 (E.D. Pa. 1975); *Guilday* v. *U.S. Department of Justice,* 385 F.Supp. 1096 (D. Del. 1974); *Allen* v. *Veterans Administration,* 8 EPD ¶9783, 10 FEP Cas. 195 (W.D. Pa. 1974); *Ficklin* v. *Sabatini,* 8 EPD ¶9829, 9 FEP Cas. 70 (E.D. Pa. 1974); *Smith* v. *Snyder,* 381 F.Supp. 1083 (E.D. Pa. 1974); *Ettinger* v. *Johnson,* 10 FEP Cas. 642 (E.D. Pa. 1974), *appeal pending,* 3rd Cir. No. 74-2171; *Russell* v. *Johnson,* 10 FEP Cas. 924 (W.D. Pa. 1975).

Fourth Circuit: Handy v. *Gayler,* 364 F.Supp. 676 (D. Md. 1973).

Fifth Circuit: Johnson v. *U.S. Postal Service,* 364 F.Supp. 37 (N.D. Fla. 1973), *aff'd per curiam,* 497 F.2d 128 (5th Cir. 1974) (trial *de novo* issue not discussed in *per curiam* opinion; opening sentence of opinion suggests question not raised on appeal); *Nimitz* v. *Berzak,* 7 EPD ¶9273 (E.D. La. 1974); *McLaughlin* v. *Callaway,* 382 F.Supp. 885 (S.D. Ala. 1974); *Eastland* v. *Tennessee Valley Authority,* 9 EPD ¶9927 (N.D. Ala. 1975), *appeal pending,* 5th Cir. No. 75-1855.

Sixth Circuit: Abrams v. *Johnson,* 7 EPD ¶9380, 9 FEP Cas. 107 (N.D. Ohio 1974); *Hockett* v. *Administrator of Veterans Affairs,* 385 F.Supp. 1106 (N.D. Ohio 1974); *Tomlin* v. *Air Force Medical Center,* 369 F.Supp. 353 (S.D. Ohio 1974); *Fisher* v. *Brennan,* 10 FEP Cas. 685 (E.D. Tenn. 1974).

Seventh Circuit: Caro v. *Schultz,* 9 EPD ¶9987 (N.D. Ill. 1974), *appeal pending,* 7th Cir. No. 74-1728.

Eighth Circuit: Haire v. *Callaway,* 9 FEP Cas. 168 (E.D. Mo. 1974).

Ninth Circuit: Evans v. *Johnson,* 7 EPD ¶9351, 8 FEP Cas. 1013 (C.D. Cal. 1974); *Thompson* v. *U.S. Department of Justice,* 372 F.Supp. 762 (N.D. Cal. 1974), *appeal pending,* 9th Cir. No. 74-1847; *Bernardi* v. *Butz,* 7 EPD ¶9381, 8 FEP Cas. 479 (N.D. Cal. 1974); *Wormley* v. *Dept. of the Navy,* 9 EPD ¶10,015, 8 FEP Cas. 1008 (N.D. Cal. 1974).

Tenth Circuit: Carreathers v. *Alexander,* 9 EPD ¶9858 (D. Colo. 1974); *Baca* v. *Butz,* 376 F.Supp. 1005 (D. N.M. 1974); *Brooks* v. *Lynn,* 10 FEP Cas. 638 (W.D. Okla. 1974).

District of Columbia Circuit: Hackley v. *Johnson,* 360 F.Supp. 1247 (D.D.C. 1973), *appeal pending,* D.C. Cir. No. 73-2072; *Robinson* v. *Warner,* 8 EPD ¶9452, 10 FEP Cas. 609 (D.D.C. 1974);

in *Sperling* may be analyzed in terms of two categories. These two categories are distinct in terms of legal theory, but they are, in many cases, equivalent in terms of practical effect.

The first category of decisions—exemplified by the Tenth Circuit decision in *Salone*—holds that the standard of judicial review in federal sector Title VII cases is the same as that enunciated in pre-Title VII adverse action cases: the decision of the agency or the Civil Service Commission is to be upheld if it is supported by "substantial evidence" in the administrative record.

The second category of decisions—exemplified by the Ninth Circuit decision in the case at bar—adopts the standard of review enunciated in the seminal case of *Hackley* v. *Johnson,* 360 F.Supp. 1247 (D.D.C. 1973), *appeal pending,* D.C. Cir. No. 73-2072. This standard

---

Gautier v. *Weinberger,* 6 EPD ¶9001, 7 FEP Cas. 473 (D.D.C. 1973); *Pointer* v. *Sampson,* 62 F.R.D. 689, 7 EPD ¶9326, 7 FEP Cas. 905 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 73-1397; *Spencer* v. *Schlesinger,* 374 F.Supp. 840 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1787; *Coopersmith* v. *Johnson,* 7 EPD ¶9388, 10 FEP Cas. 627 (D.D.C. 1974); *Roney* v. *Saxbe,* 380 F. Supp. 1191 (D.D.C. 1974); *Pendleton* v. *Schlesinger,* 8 EPD ¶9598, 8 FEP Cas. 853 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1929; *Thomas* v. *Dept. of State,* 8 EPD ¶9622 (D.D.C. 1974); *Roberts* v. *Mumford,* 8 EPD ¶9692, 8 FEP Cas. 1195 (D.D.C. 1974); *Leinster* v. *Engman,* 8 EPD ¶9774, 10 FEP Cas. 614 (D.D.C. 1974); *McGowan* v. *U.S. Information Agency,* 8 EPD ¶9787, 10 FEP Cas. 618 (D.D.C. 1974); *Butler* v. *Kleppe,* 9 EPD ¶10,054, 10 FEP Cas. 869 (D.D.C. 1975); *Smith* v. *Gunther,* 9 EPD ¶9915 (D.D.C. 1975) (parties "conceded" that administrative record constituted the material facts of the case); *Marshall* v. *U.S. Highway Administrator,* 7 EPD ¶9814, 10 FEP Cas. 559 (D.D.C. 1973) (not clear whether this *pro se* case was brought under Title VII).

does not in theory exclude the possibility that a plenary judicial trial might be appropriate in some circumstances in federal sector Title VII cases. *Hackley* held that

> "The trial *de novo* is not required in all cases. The District Court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the clear weight of the evidence in the record, no new trial is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate, remand, take testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record." 360 F.Supp. at 1252.

In analyzing the facts in the claims before it, the *Hackley* court applied the above standard and a "preponderance of the evidence" test in determining whether the administrative decisions should be upheld. The fact that the *Hackley* court applied the "preponderance of the evidence" test (which is usually associated with trial level factual determinations), rather than the "rational basis" or "substantial evidence" tests (which are usually associated with review of an administrative record), indicates that it viewed its function, even after a full administrative hearing, as encompassing a broader scope of review than is employed in pre-Title VII adverse federal personnel action cases. 360 F.Supp. at 1252, 1253, 1255.

However, while there is a difference between the stated holdings of those courts (including the Tenth Circuit in *Salone*) which have adopted a "substantial evidence" approach, and of those courts (including the Ninth Circuit in the case at bar) which have adopted

the *Hackley* approach, it should not be assumed that the dichotomy of theory has resulted in a dichotomy of practice. To the contrary, a review of the cases cited at footnote 7, *supra,* will show that many of the district court decisions which cite and purport to follow the *Hackley* decision in fact apply a "substantial evidence" test, or an even less demanding standard (such as a determination that the administrative decision was not "arbitrary or capricious").[8]

In the more than three years since the 1972 federal sector provisions became effective, there is a plethora of published federal sector Title VII decisions, included in footnote 7, *supra,* denying a trial *de novo* and entering summary judgment on the merits in the government's favor on the basis of the administrative record. In contrast, there are only four published de-

---

[8] *E.g., Handy* v. *Gayler,* 364 F.Supp. 676, 679 (D. Md. 1973) (purporting to follow *Hackley,* but adopting standard of adverse personnel action cases); *Tomlin* v. *Air Force Medical Center,* 369 F.Supp. 353, 356 (S.D. Ohio 1974) (purporting to follow *Hackley,* but stating that court will review record "for evidence of arbitrary action", and "if no arbitrariness is found, the Court will and should defer to administrative expertise"); *Nimitz* v. *Berzak,* 7 EPD ¶9273, at p. 7254 (E.D. La. 1974) (citing *Hackley,* but holding that administrative findings "are neither arbitrary nor capricious" and are "supported by complete and substantial evidence"); *Roberts* v. *Mumford,* 8 EPD ¶9692, at p. 5896, 8 FEP Cas. 1195, 1197-8 (D.D.C. 1974) (purporting to follow *Hackley,* but adopting "substantial evidence" test); *Cates* v. *Johnson,* 377 F.Supp. 1145, 1145-6 (W.D. Pa. 1974) (citing *Hackley,* but adopting "substantial evidence" test), *appeal pending,* 3rd Cir. No. 74-2079; *McGowan* v. *U.S. Information Agency,* 8 EPD ¶9787, at pp. 6304-5, 10 FEP Cas. 618, 619-20 (D.D.C. 1974) (citing *Hackley,* but adopting "substantial evidence" test); *Fisher* v. *Brennan,* 10 FEP Cas. 685, 687-8 (E.D. Tenn. 1974) (citing *Hackley,* but applying "substantial evidence" and "arbitrary or capricious" tests).

cisions entering judgment on the merits in a plaintiff's favor, and in two of these cases the court permitted a trial *de novo.*[9] Unless it is to be believed that discrimination in federal employment is such a rare occurrence that the 1972 Title VII amendments were not really even necessary, this state of affairs suggests the degree to which the effectiveness of the 1972 amendments has been undermined by decisions that have insulated the federal government's employment practices from plenary judicial scrutiny. More than three years of experience under the standard of *Hackley* and its progeny have confirmed the warning issued by the district court in the case of *Jackson* v. *U.S. Civil Service Comm'n,* 379 F.Supp. 589 (S.D. Tex. 1973):

> ". . . it is simply too easy for a federal judge operating under *Hackley* to lapse, in his discretion, into a review of the record using the substantial evidence test or the test set forth in *Chiriaco* v. *United States* [procedural due process and absence of arbitrary or capricious agency action]. . . . Only if a trial de novo is mandatory will be federal employee be assured of the congressional intent and that is a full, impartial review of the case in an adversary context." 379 F.Supp. at 594 (emphasis added).

The significance of the issue presented in the case at bar is further illustrated by a related issue which

---

[9] *Reynolds* v. *Wise,* 375 F.Supp. 145 (N.D. Tex. 1973-4); *McLaughlin* v. *Callaway,* 9 EPD ¶10,098 (S.D. Ala. 1975). In one of the other cases the district court received supplemental evidence. *Robinson* v. *Warner,* 8 EPD ¶9452, 10 FEP Cas. 609 (D.D.C. 1974). In the other, the district court concluded that no supplemental evidence was necessary, and entered a summary judgment in the plaintiff's favor. *Day* v. *Weinberger,* 8 EPD ¶¶9646, 9771 (D.D.C. 1974).

this case does not present, but whose outcome is heavily dependent on the resolution of the trial *de novo* issue. The question of the availability of class actions in federal sector Title VII cases has not been the subject of any court of appeals decision to date. However, the Third Circuit has held that "it was Congress' intent to provide an aggrieved federal employee with as full a panoply of procedural remedies in the district court as those afforded a private sector litigant." *Sperling* v. *United States, supra,* App. 73a-74a. If that is correct, then class actions should be available in federal sector Title VII cases (provided, of course, that the requirements of Fed.R.Civ.P. 23 are met). On the other hand, most district court decisions on the class action issue have proceeded under the assumption that federal sector Title VII cases are not *de novo* proceedings, and this assumption has inevitably led these courts to refuse class action treatment.[10] Thus it has been held that "federal employees cannot maintain class actions under Title VII" because "a class action . . . would require exploration of factual issues obviously beyond the record of a single employee"[11]; and that "[w]here there is review on the record and no trial *de novo,* there is no class action."[12] Because the majority of district courts have held against trial *de novo,* it is not surprising that there are at this writing

[10] For example, class certification was denied in the following cases, which are cited in footnote 7, *supra: Pointer* v. *Sampson; Spencer* v. *Schlesinger; Pendleton* v. *Schlesinger; Richerson* v. *Fargo; Ficklin* v. *Sabatini; Eastland* v. *Tennessee Valley Authority.*

[11] *Pendleton* v. *Schlesinger,* 8 EPD ¶9598, at p. 5569, 8 FEP Cas. 853, 853 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1929.

[12] *Spencer* v. *Schlesinger,* 374 F. Supp. 840, 844 n. 6 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1787.

only four reported decisions in which requests for class certification have received a favorable response.[13] The class action has been the backbone of Title VII's effectiveness in the private sector.[14] While the question of its availability in the federal sector is not presented in the case at bar, the relationship of that question to the trial *de novo* issue invests the latter with a weighty additional measure of importance.

The case at bar presents for decision the question which has been the major roadblock to proper implementation of the 1972 amendments for over three years. Until this question is finally resolved by this Court, the effectiveness of the 1972 amendments will continue to be drastically impaired.

II

The Decision Below Is in Conflict with Principles Established by Decisions of this Court

If the defendant in the case at bar were a private company rather than a federal agency, and the court of appeals had held that plenary judicial proceedings were not a matter of right and that the district court could, in its discretion, simply review the record of administrative or arbitral proceedings, then the decision below would be squarely in conflict with deci-

[13] *Allen* v. *Crosby,* 8 FEP Cas. 528 (E.D. Pa. 1973); *Richerson* v. *Fargo,* 61 F.R.D. 641, 7 EPD ¶9310, 7 FEP Cas. 488 (E.D. Pa. 1974), *vacated,* 64 F.R.D. 393, 8 EPD ¶9751, 10 FEP Cas. 644 (E.D. Pa. 1974); *Thompson* v. *McCormick,* 10 FEP Cas. 560 (D.D.C. 1974); *Sylvester* v. *U.S. Postal Service,* 10 FEP Cas. 758 (S.D. Tex. 1975).

[14] *See, e.g., Moody* v. *Albemarle Paper Co.,* 474 F.2d 134 (4th Cir. 1973), *cert. granted,* 95 S.Ct. 654 (1974).

sions of this Court. It is settled that Title VII actions against private sector defendants are *de novo* judicial proceedings, and that prior administrative or arbitral determinations cannot override the plaintiff's right to a plenary judicial trial. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974).

This petition therefore raises the fundamental question of whether the federal government is to be subjected to different and less demanding legal standards and procedures under Title VII than those to which all other classes of defendants are subjected. It seems obvious that a legislative intention to enshrine such a double standard could be inferred only from the most compelling evidence. *Compare, Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86, 89-91 (1973).

This Court has recognized that in Title VII actions, the forum of trial "inevitably affects the scope of the substantive right to be vindicated." *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 56. For this reason, the following recent statements by this Court are highly instructive on the present issue, even though they are addressed to the question of substantive legal standards rather than to any question of procedure:

> ". . . the mechanism for enforcing long-outstanding Executive Orders forbidding government discrimination had proved ineffective for the most part. [Footnote omitted.] In order to remedy this, Congress, by the 1972 Act, amended the 1964 Act and proscribed discrimination in most areas of federal government. . . . In general, it may be said that *the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government.* As stated in the House Report,

> " 'To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform policies. *The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly.'* H.R. Rep. No. 92-238, on H.R. 1746, 92 Cong., 1st Sess. 24-25 (1971)." *Morton* v. *Mancari,* 94 S.Ct. 2474, 2480-81 (1974) (emphasis added).

In addition, the following language of this Court's opinion in *Alexander* v. *Gardner-Denver Co., supra,* is in substantial part applicable by analogy to federal sector Title VII actions such as the case at bar:

> "[Title VII] does, however, vest federal courts with plenary power to enforce the statutory requirements. . . .
>
> * * *
>
> ". . . legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Title VII provides for consideration of employment-discrimination claims in several forums. . . . And, in general, submission of a claim to one forum does not preclude a later submission to another. . . .
>
> * * *
>
> "The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions [here substitute 'federal agency or Civil Service Commission decisions'] would be inconsistent with that goal. Furthermore, we have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.'
>
> * * *

> ". . . the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.
>
> * * *
>
> "The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." 415 U.S. at 47-60 (footnotes omitted).

The decision below is inconsistent with the established general principles set forth above. The substantive law developed in private sector Title VII cases is now fully applicable in the federal sector. The procedures followed in adjudicating federal sector cases must, therefore, be attuned to the full effectuation of the substantive rights which are involved. There is no justification for applying a double standard under Title VII and favoring federal agency defendants over all other types of defendants. The anomaly of such a double standard is especially striking in the present context, where the government opposes plenary judicial trials in federal sector Title VII cases, while the Solicitor General has successfully argued to this Court that a private sector plaintiff must receive a plenary judicial trial *de novo* regardless of prior adverse administrative and arbitral determinations.[15]

In *Sperling* v. *United States, supra,* the Third Circuit fully rejected the double standard which the Ninth

---

[15] Brief for the United States as Amicus Curiae, *Alexander* v. *Gardner-Denver Co.*, No. 72-5847, October Term, 1973.

Circuit adopted in the case at bar. Certiorari should be granted so that this Court can determine whether or not its decisions in private sector cases are to apply with full force and effect to the federal government.

III

The Decision Below Is Inconsistent with the Language and Purpose of the 1972 Amendments to Title VII

A. The portion of Title VII as amended which creates a right to sue federal government defendants —Section 717(c), 42 U.S.C. § 2000e-16(c)—provides that at certain specified stages in the administrative enforcement procedure (to be discussed below), a complainant, "if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file *a civil action as provided in section 706. . . .*" (Emphasis added.) Section 706 is the portion of Title VII which details the procedures to be followed in civil actions against private sector (and state and local government) defendants. In addition, Section 717(d) of Title VII, 42 U.S.C. § 2000e-16(d), which defines the judicial procedures that "shall govern" civil actions brought against federal agencies under Section 717, reads as follows:

> "The provisions of section 706(f) through (k), as applicable, shall govern actions brought hereunder."

A review of Sections 706(f) through (k) provides compelling support for the view that actions against the federal government under Title VII are to proceed in the same manner as actions against private employers,

and are to include a plenary judicial trial of the plaintiff's allegations. The Third Circuit, having reviewed this statutory language, concluded that it "hardly admits of any other interpretation." *Sperling* v. *United States, supra,* App. 60a.[16]

The Third Circuit's analysis is further buttressed by a full review of the various stages in the administrative enforcement procedure at which the statute gives the complainant the option to file his civil action. Section 717(c) of Title VII, 42 U.S.C. § 2000e-16(c), and the Civil Service Commission's implementing regulations, 5 C.F.R. §§ 713.201, *et seq.*, provide that an employee or applicant for employment who has filed an administrative complaint with his agency may file a civil action in federal district court in any of the following six basic circumstances:

1. if 180 days have elapsed since the filing of the administrative complaint and *the agency has not taken final action on the complaint* (whether or not a hearing has been held); 42 U.S.C. § 2000e-16(c); 5 C.F.R. § 713.281(b);
2. within 30 days of a *rejection or cancellation of the complaint*; 42 U.S.C. § 2000e-16(c); 5 C.F.R. § 713.215;

[16] It is true, of course, that Section 717(d) says that Sections 706(f) through (k) shall govern "as applicable." But as a review of the sections makes clear, that phrase merely covers the fact that portions of certain sections such as those dealing with the Equal Employment Opportunity Commission and the Attorney General—*e.g.*, Sections 706(f)(1), 706(i), 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(i)—are obviously not applicable to actions against the federal government. To read more than this into the phrase "as applicable" would render Section 717(d) meaningless. *Sperling* v. *United States, supra,* App. 62a-64a.

3. within 30 days of receipt of notice of *final agency action* on the complaint *without a hearing;* 42 U.S.C. § 2000e-16(c); 5 C.F.R. §§ 713.217(b)(3), 217(c), 221(b)(1), 221(b)(3), 281(a);
4. within 30 days of receipt of notice of *final agency action* on the complaint *following a hearing;* 42 U.S.C. § 2000e-16(c); 5 C.F.R. §§ 713.217(b)(2), 221(b)(2), 281(a);
5. if 180 days have elapsed since the filing of an appeal from the final agency action (with or without a hearing) to the Civil Service Commission and *the Commission has not taken final action on the appeal*; 42 U.S.C. § 2000e-16(c); 5 C.F.R. §§ 713.231(a), 281(d); or
6. within 30 days of receipt of notice of *final Civil Service Commission action on an appeal* from the final agency action (with or without a hearing); 42 U.S.C. § 2000e-16(c); 5 C.F.R. §§ 713.231(a), 281(c).

It should be noted that even the above categorization is in fact an oversimplification, since circumstances 1, 5 and 6 can be subdivided into two different categories depending on whether an administrative evidentiary hearing has been held; and it should be noted that in all cases the question of whether such a hearing is held is completely at the option of the complainant. 5 C.F.R. §§ 713.217(b), 713.221(b). It should also be noted that the scope and nature of the agency's investigation of a complainant's allegations where no administrative hearing is held is completely controlled by the agency; and that even where the complainant elects to proceed to an administrative hearing, he has no rights to discovery comparable to those provided by the Federal Rules of Civil Procedure. 5 C.F.R. §§ 713.216, 713.218.

It is immediately apparent from the six-category analysis set forth above that the only statutory prerequisite to maintaining a civil action common to all of the six circumstances listed is the filing of an administrative complaint; neither an agency or CSC decision, nor an administrative hearing, is a precondition to invocation of the judicial process. The language of Section 717 gives the federal employee or applicant for employment the right to invoke the judicial process in each of circumstances 1-6 and their subdivisions. It is highly significant that the statute and the CSC regulations make absolutely no distinction between the nature of the judicial proceedings afforded in the different circumstances. In each circumstance the civil action is simply "governed" by Sections 706(f) through (k). 42 U.S.C. § 2000e-16(d). Since no distinctions are made among the rights of plaintiffs who are in different circumstances, the judicial process contemplated must be the same in all cases. And since no explicit restriction on the judicial process is stated in the statute, the process is impliedly unrestricted.

In some of the circumstances enumerated anything less than a plenary judicial trial would be plainly unthinkable. For example, in circumstance 1 the plaintiff files his civil action after 180 days have elapsed with no final agency action on the initial administrative charge. It may be that the agency's investigation has not even been commenced; or there may have been an investigation but no CSC-appointed examiner's hearing; or there may have been a hearing but no examiner's findings; or there may have been a hearing with findings but no final agency decision. In the first two cases, due process would clearly require the district court to hold an evidentiary hearing. In the third case,

the absence of any findings by the officer who heard testimony would also dictate a new hearing before a judge who would make his own findings. In the fourth case there would at least be a record and findings for the judge to review. But regardless of the fact that each of these four cases could potentially arise within the confines of circumstance number 1, the statute draws no distinctions concerning the treatment to be accorded "civil actions" filed in the various cases described. Since a plenary trial is obviously required in the first three cases, it follows that it is required in the fourth and in other cases as well. Indeed, if Congress had intended that judicial proceedings under the 1972 amendments be limited to a "review of the record," it would certainly not have authorized suits in cases where there is no record to review.

As previously noted, the statute also contemplates situations other than those just described, *e.g.*, suit after final agency action, after final CSC action, and after the CSC has failed to render a decision within one hundred eighty (180) days. Each situation may or may not have involved an evidentiary hearing with findings. Yet despite the obvious differences among these situations, the statute makes no distinctions and the scope of the employee's "civil action" is not restricted under any of the various circumstances. Title VII is a remedial statute and the courts may not engraft upon it restrictions which it does not itself impose. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 798-9 (1973). It follows that the "civil action" to which a plaintiff is entitled is, as the statutory language so clearly indicates, a plenary judicial proceeding, including presentation of the case to a district judge, who will hear and determine the case after

discovery and a trial on the merits, and grant whatever relief is appropriate in light of his findings.[17]

B. The legislative history of the 1972 amendments to Title VII affirmatively indicates that Congress did not intend to limit the judicial function in federal sector Title VII ligitation to review of an administrative record, but intended to grant federal sector plaintiffs the same rights as private sector litigants, including the right to a full evidentiary hearing in district court.

The Senate Committee Report on the new Section 717(c) authoritatively states the legislative purpose behind the creation of a right of action in the federal sector:

> "Aggrieved employees or applicants will also have *the full rights available in the courts as are granted to individuals in the private sector under title VII.*" S. Rep. No. 92-415, 92d Cong., 1st Sess. at 16-17 (1971); *Legislative History of the Equal Employment Opportunity Act of 1972,* 92d Cong., 2d Sess. (Committee Print, 1972) [hereinafter cited as *History*], at 425 (emphasis added).

As the House Committee on Education and Labor reported in June 1971, the Civil Service Commission was responsible for a "critical defect" in the federal

[17] This is not to say, of course, that in no case would a summary judgment be possible under ordinary Rule 56 standards. *Sperling* v. *United States, supra,* App. 74a, 79a. If, for example, uncontroverted evidence established that the plaintiff was never employed by and never applied for employment with the defendant agency, there would obviously be no genuine issue of material fact and the court could dispose of the plaintiff's fraudulent claim by summary judgment. But in the case at bar triable issues of fact concerning whether the petitioner was discriminated against clearly exist under ordinary Rule 56 standards as applied in cases where plenary judicial trials are normally afforded.

government's efforts to implement a policy of equal employment opportunity. The administrative process for investigating and resolving discrimination complaints—a process which was, then as now, devised and overseen by the CSC[18]—actually "impeded rather than advanced" the goal of eliminating discrimination, and led to "a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal employees."[19] *Morton* v. *Mancari,* 94 S.Ct. 2474, 2480-81, 2481 n.22 (1974). Under the CSC regulations—then as now—the supposedly independent hearing examiner's findings and decision on a discrimination complaint were merely recommendations to the offending agency, which in turn would render the final decision itself. Thus, the agency acted as both defendant and judge. The continued workings of this process are vividly illustrated by the case at bar, in which the hearing examiner found that petitioner had been discriminated against, and the defendant agency simply rejected the examiner's adverse findings. (App. 1a-17a, 18a-21a).

In *Sperling* v. *United States, supra,* the Third Circuit reviewed the legislative history of the 1972 amend-

[18] Detailed CSC regulations for processing complaints of discrimination which were quite similar to the regulations now in effect were already in existence three years prior to the 1972 amendments. The regulations were expanded somewhat after the amendments, to include, for example, provisions concerning the right to sue provided by the amendments, clarifying the authority to award certain types of relief, and allowing third party allegations (but recognizing no right to sue on the basis of such allegations). In most other respects, the regulations are basically unchanged. *Compare* 5 C.F.R. Part 713, 34 Fed.Reg. 5367 (Mar. 19, 1969), as amended at 34 Fed.Reg. 14023 (Sept. 4, 1969) *with* 5 C.F.R. Part 713, 37 Fed.Reg. 25699 (Dec. 2, 1972).

[19] H.R. Rep. No. 92-238, 92d Cong., 1st Sess. at 24 (1971) (hereinafter House Report); *History* at 84.

ments in considerable detail, and concluded that "it was Congress' intent to provide an aggrieved federal employee with as full a panoply of procedural remedies in the district court as those afforded a private sector litigant," including "a right to a trial *de novo*." (App. 73a-74a). The court of appeals' opinion in the case at bar is devoid of any analysis in support of its contrary conclusion. (App. 39a-40a).

The conclusion reached by the Third Circuit in *Sperling* is in no way inconsistent with the Congressional determination to maintain the Civil Service Commission's administrative role in federal sector cases. Congress clearly intended that the courts would provide federal sector litigants a full evidentiary hearing as a check on the Civil Service Commission, just as it intended that the courts would provide private sector litigants a full evidentiary hearing as a check on the Equal Employment Opportunity Commission. The opportunity for a full judicial hearing was provided in both federal and private sector cases in part because Congress expressly recognized that both CSC and EEOC were inherently partisans, though partisans of different standards. CSC was viewed as a partisan of the federal employer, since it is responsible for the approval of the very agency employment standards whose lawfulness many Title VII complainants call into question. EEOC was viewed as a partisan of the private employee, since it is the prosecutor of his case. Thus the Senate Committee report on Section 717(c) states:

> "The Civil Service Commission's primary responsibility over all personnel matters in the Government does create a built-in conflict of interest for examining the Government's equal employment opportunity program for structural defects which

> may result in a lack of true equal employment opportunity.
>
> * * *
>
> "An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private right of action in the courts by Federal employees who are not satisfied with the agency or Commission decision." S. Rep. No. 92-415, 92d Cong., 1st Sess. 15-16 (1971); *History* at 424-25.[20]

Nor is the conclusion that Congress granted federal sector litigants the right to a full evidentiary hearing in court inconsistent with the purpose of maintaining an internal grievance procedure within the federal government. Congress carefully provided in Section 717(c) that prior to filing suit under Title VII a federal sector complainant must first file a formal complaint with his agency, and await an agency decision, so that the agency will have an opportunity to put its own house in order. As soon as the agency reaches a decision, however, or permits 180 days to pass without taking final action, this policy has been fulfilled, and the complainant may proceed directly to court. If the complainant prefers first to proceed to further stages in the internal grievance procedure, he is free to do so; but no penalty attaches to such an election (so as not to deter further resort to administrative procedures), and subsequent timely resort to a court action still results in a plenary judicial trial. These conclusions are perfectly consistent with the dual policy of preserving the internal grievance procedure but also providing a judicial remedy.

---

[20] For further remarks regarding Civil Service Commission bias, see Remarks of Rep. Fauntroy, *History* at 269-271; and Remarks of Rep. Frenzel, *History* at 299. The "built-in conflict of interest" characterization is also contained in the House Report at 24, *History* at 84.

C. In the case at bar the court of appeals adopted the approach of the district court in *Hackley* v. *Johnson,* 360 F. Supp. 1247 (D.D.C. 1973), *appeal pending,* D.C. Cir. No. 73-2072. The error of the *Hackley* decision is discussed at length by the Third Circuit in the *Sperling* case. (App. 64a-79a). Petitioner submits that *Hackley* represents in essence an impermissible attempt at judicial modification of the 1972 amendments. The *Hackley* court's decision was substantially motivated by its belief that to permit plenary judicial trials in federal sector Title VII cases would place an unacceptable "burden" on the district courts in the District of Columbia. 360 F. Supp. at 1249 n.2 and text at n.2. This kind of consideration is simply foreclosed by the legislative decision which Congress made in 1972 when it extended Title VII's judicial remedy to the federal sector. *Sperling* v. *United States, supra,* App. 78a-79a.

In commuting the right to plenary judicial proceedings to a matter of discretion, the *Hackley* court erroneously emphasized the limited scope of review of CSC proceedings which was available prior to the 1972 amendments, concluding that "[o]bviously a trial *de novo* would involve a very different approach." 360 F. Supp. at 1250. In fact, it was the express purpose of the 1972 amendments to afford such a "different" approach, replacing the narrow scope of review previously applicable through the Administrative Procedure Act. *Sperling* v. *United States, supra,* App. 60a, 64a; *see also, Reynolds* v. *Wise,* 375 F.Supp. 145, 148-9 (N.D. Tex. 1973-4).

In the case at bar the district court's decision in the government's favor contained no discussion of the facts of the case, no indication of why it had concluded

that petitioner had not been discriminated against, and no explanation of why it had decided in this particular case to limit the judicial proceedings to a review of the administrative record. (App. 30a-33a). The court of appeals did state its reasons for concluding that petitioner had not been discriminated against. (App. 38a-39a). But neither the district court, nor, of course, the court of appeals, heard any testimony; and the only officer to hear testimony—the complaints examiner—concluded that the evidence required a finding of discrimination. (App. 1a-17a). In a case revolving around the selecting official's reasons for failing to select petitioner—who, it is undisputed, was "highly qualified" for the position in question—it is obvious that important judgments concerning the credibility of witnesses' testimony are involved. The hearing officer, who observed the testimony, found in favor of petitioner; the district court, and the court of appeals, acted on a cold record when they affirmed the defendant agency's rejection of the complaints examiner's finding.

The court of appeals held that petitioner was not entitled to a trial *de novo* as a matter of right, but was required to demonstrate a need in her particular case for supplementation of the administrative record or for a trial *de novo.* (App. 40a-41a). This was an anomalous burden to place on a party who had sought but not been permitted to conduct any discovery, and who had prevailed before the only officer to hear, and judge the credibility of, oral testimony. But even assuming *arguendo* that such a showing by petitioner was required, the court of appeals simply ignored the record in holding that no showing of necessity had been made. One of petitioner's first acts after suit was filed in the

district court was to notice the deposition of, and request production of documents by, the selecting official; and to notice the deposition of the person selected in preference to petitioner for the job in question. Since petitioner represented herself at the administrative hearing, the selecting official had never been questioned by an attorney acting in her behalf. And the complaints examiner had refused to call 15 of the 24 witnesses whom petitioner had requested, including the individual selected for the job in question, whose deposition petitioner sought in the district court; the selectee was surely a material witness whom petitioner was entitled to examine when the issue was whether he was better qualified than she for the job in question. Petitioner made clear in the district court the reasons why she needed the discovery which she had requested.[21]

The decision below is based on a conclusion that Congress intended to provide federal and private employees with "equivalent, but not identical, judicial remedies under Title VII." (App. 40a). It is difficult to see how a judicial remedy which does not include discovery or the right to have a court evaluate the credibility of witnesses by observing their testimony could be deemed equivalent to the *de novo* judicial proceeding which this Court has mandated in private sector Title VII cases. The administrative procedure provided by the Civil Service Commission's regulations (5

[21] As set forth at nn. 3, 4, *supra*, the procedure pursuant to which the issues were presented to the district court was the procedure which the court itself requested. Petitioner certainly cannot be faulted, therefore, for any defects which the court of appeals perceived in that procedure. Petitioner supplied the district court with all the information which it requested or required on the trial *de novo* question, and, as the record reflects, the district court never suggested otherwise.

C.F.R. § 713.201, *et seq.*) is certainly not equivalent to a judicial proceeding. Typically, as in the case at bar, the complainant is not represented by an attorney at the administrative level; in any event, there is no provision for court appointment of an attorney for the complainant, or for an award of attorneys' fees if the complainant prevails.[22] The investigation which is conducted is produced under the direction of, and entirely controlled by, the agency which is the defendant in any subsequent judicial proceedings. Only if the complainant so elects is an administrative evidentiary hearing held, and even then there is no subpoena power available to the complainant, and no right to discovery comparable to that provided by the Federal Rules of Civil Procedure. The CSC's own handbook for complaints examiners explains that "[t]he hearing is an adjunct to the investigation. *It is not an adversary proceeding but is an administrative proceeding designed to provide additional evidence.*"[23] The court of appeals plainly erred in concluding that such an administrative proceeding followed by judicial review of the record could provide a remedy "equivalent" to a plenary judicial trial.

[22] *Compare*, 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(k).

[23] U.S. Civil Service Commission, *Discrimination Complaint Examiner's Handbook* (April 1973), at p. 5.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

J. HAROLD FLANNERY
JOEL L. SELIG

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
733 Fifteenth Street, N.W.
Suite 520
Washington, D.C. 20005

STUART P. HERMAN
9601 Wilshire Boulevard
Suite 632
Beverly Hills, California 90210

Attorneys for Petitioner

June 1975.

APPENDIX

COMPLAINTS EXAMINER'S FINDINGS AND RECOMMENDED DECISION

FINDINGS AND RECOMMENDED DECISION IN THE DISCRIMINATION COMPLAINT OF:

COMPLAINANT: Jewell D. Chandler, 5719 Aladdin St., Los Angeles, CA. 90008

REPRESENTATIVE: None

AGENCY: Veterans Administration, Regional Office, 11000 Wilshire Blvd., Los Angeles, CA. 90024

REPRESENTATIVE: James W. Bolita, Assistant Chief, Finance & Data Processing Division, VA Regional Office, 11000 Wilshire Blvd., Los Angeles, CA. 90024

COMPLAINT: Discrimination—Race (Black) and Sex (Female)

DATES OF HEARING: January 26 and 29, 1973

COMPLAINTS EXAMINER: Edna E. J. Francis, 851 So. Broadway, Los Angeles, CA. 90014

INTRODUCTION

The complaint by Mrs. Jewell D. Chandler (hereinafter referred to as Complainant) that the Veterans Administration (hereinafter referred to as the Agency) discriminated against her because of race (Black) and sex (female) arose when she was not selected for a GS-13 supervisory position.

After Complainant learned she was not selected for the position, she had an initial interview with the EEO Counselor, Mr. William Hall, Jr. In an attempt to resolve her complaint, Mr. Hall consulted with the Personnel Officer, the Adjudication Officer (the alleged discriminating official) and the Director of the VA Regional Office, Los Angeles. On September 25, 1972, Complainant filed a formal complaint of discrimination, explaining why she believed the selecting official had discriminated against her in the promotion action. The EEO Counselor held a final interview with the Complainant on October 3, 1972.

Mr. Robert C. Mark, Chief, Recreation Therapy, PMRS, VA Hospital, Sepulveda, CA., designated to investigate the complaint, made an investigation during the period from October 10, 1972 to October 25, 1972. Since no satisfactory adjustment could be made on the complaint, the Agency notified the Complainant on November 10, 1972, that she had a right to a hearing and a subsequent decision by the General Counsel. Complainant advised the Agency on November 17, 1972 that she wanted a hearing.

A hearing was conducted on January 26 and 29, 1973 by the undersigned examiner. Testimony was heard from a total of ten witnesses, seven called by the Complainant, two by the Examiner, and the Complainant in her own

behalf. The Agency did not call witnesses. Although the parties did not offer exhibits at the hearing, the undersigned sought additional information from the agency which would be helpful in resolving the complaint: supervisory appraisals of the Complainant and the person selected for the position; information regarding promotions made by the alleged discriminatory official during the past two years; and the official personnel files of the Complainant and the person selected for the position. To the extent necessary, information from those sources was considered in arriving at a decision on this complaint.

To avoid infringing any rights of privacy, the Examiner has summarized and interwoven into the body of the decision information gleaned from official personnel folders and supervisory appraisals, rather than place in the file verbatim copies of relevant material from these sources. The information sheet regarding promotions made by the selecting official within the past two years is marked as Hearing Exhibit #1. The verbatim transcript of the hearing has been made part of the record.

BACKGROUND

Complainant began her career with the Veterans Administration Regional Office, Los Angeles, on April 24, 1966, in the Adjudication Division as a Claims Clerk, GS-7. She was promoted to Veterans Claims Examiner, GS-9, in the Adjudication Division on October 8, 1967, advanced in that position to GS-11 on June 15, 1969, and was promoted to her present grade level, GS-12, on March 21, 1971.

The Adjudication Division has 276 employees whose grades range from GS-3 to GS-15. Of that number, 180 are Caucasian, 69 are Black, and 27 are of other minority designation, such as Mexican-American, Japanese-American, and Filipino-American. As of October 13, 1972 when the Investigator made his investigation, 30 of 159 employees in Grades 9 through 15 were Black; 46 of the 159

were female. In grades 3 through 7, 39 of 117 employees were Black; 60 of that number were female. The investigative report reflects that at the time of the investigation, Adjudication Division had no Blacks in positions above GS-12; two females (Caucasian) were employed above that level, both as GS-13 supervisors.

Complainant applied for the position of Supervising Veterans Claims Examiner (Section Chief), GS-13, pursuant to Promotional Announcement No. 80-72, which is undated (Complaint File Exhibit 26). Because the evaluation panel identified her as one "highly qualified" for the position, she was referred for further consideration to the interview panel, in accordance with the VA Promotion Plan (Complaint File Exhibit 27). When Complainant learned she was not selected, she invoked the discrimination complaint process, alleging that the Adjudication Officer, Mr. Martin C. Holland (Caucasian), did not select her for the position as his immediate subordinate because he did not want a black female on his supervisory staff.

Complainant filed CSC Form 894 (Complaint of Discrimination in the Federal Government) on September 25, 1972 and supplemented it with a memorandum to the Director, VA Regional Office, Los Angeles. (The form and the memorandum appear in the Complaint File under Exhibit 37).

The Complainant supported her complaint of discrimination with the following allegations, in substance:

(1) that she had demonstrated technical proficiency in the three main areas of responsibility for the Section Chief position (compensation, pension, and education claims) whereas the male selected for the position had not demonstrated technical proficiency in all three areas;

(2) that she did not receive due consideration for her "potential" to perform in a supervisory capacity, inasmuch as she had frequently performed many of the responsibilities associated with supervision

whereas the male selected for the position had rarely performed supervisory responsibilities and therefore had not demonstrated "potential";

(3) that she was not given due credit for her sick leave balance, as required by the VA Promotion Plan;

(4) that she had the ability to read computer printouts, an ability which is needed in the supervisory position, whereas the male selected for the position lacked that ability at the time of his selection;

(5) that the selecting official gave disproportionate weight to the significance of a law degree, because it enhanced his justification for selecting a male for the position;

(6) that the selecting official had never selected a female for a GS-13 position, and did not wish to select a female supervisor, especially not a black female, for the GS-13 Section Chief position.

Issue

Whether the Veterans Administration Regional Office, Los Angeles, discriminated against the Complainant when it did not select her for the position of Supervising Veterans Claims Examiner.

Analysis and Findings

Allegation 1. The Adjudication Officer, Mr. Holland, testified at the hearing that the employee selected for the position, Mr. Inocentes Dineros (Filipino-American), "has never worked in the education phase of our operations, but does have some overall familiarity with the situation." (Hearing Transcript, p. 18). He stated that a Section Chief does not have to be familiar with all of the details of an area as the individuals doing the work; rather, as a supervisor, one has to be familiar enough with certain areas to know what the employees are doing, what changes are going on, and where to get information when necessary.

Mr. Dominic Ballanti (Caucasian), a Section Chief in Adjudication Division, testified that he had been at the VA Regional Office longer than Mr. Dineros and that during his tenure there has never known Mr. Dineros to work on any type of educational awards (Hearing Transcript, p. 27).

It is undisputed in the record that the Complainant has worked in all areas of authorization—compensation, pension and education. Mr. Holland said of the Complainant at the hearing: "I would say Mrs. Chandler is knowledgeable, very knowledgeable in the area of education, above average in knowledge of compensation and pension" (Hearing Transcript, p. 20).

On the basis of the foregoing information, it is my finding that Allegation 1 has been substantiated.

Allegation 2. The forthcoming analysis will deal with formal and informal training administered by Complainant and Mr. Dineros to others, and their participation in extra-detail assignments and self-development activities.

According to testimony at the hearing by Mr. Holland, he has never known Mr. Dineros to train employees as part of a special assignment. (Hearing Transcript, p. 16). There is no documentation in Mr. Dineros' Official Personnel Folder (OPF) which would indicate that he has ever formally trained employees. The justifications for several performance awards commend him for his ability to motivate and assist employees. The earlier award, granted to him in June 1971 as a GS-12 Veterans Claims Examiner, contains some evidence that he, through personal instruction and consultation, did a commendable job in upgrading the work of several adjudicators who needed assistance in compensation and pension work, and that he did an excellent job reviewing and screening cases of senior adjudicators and adjudicators assigned to his digits. The later award, granted to him in August 1972, recognized him for his ability to successfully supervise his section in the absence of

his Section Chief; his guidance to employees; insuring application of current directives, decisions and information; and his public relations abilities. In a memorandum dated January 12, 1972, his supervisor, Mrs. Fillerup, commended Mr. Dineros for the quality and quantity of work he produced and for the patience and empathy he exhibited in training Section E employees. On November 19, 1971, the Chief Attorney commended Mr. Dineros for his exceptional work during a detail to Field Legal and Investigative Section which resulted in excellent production and materially contributed to reducing the field examination backlog.

After acknowledging that extra-detail assignments are part of the Section Chief's position, Mr. Holland told the Investigator that Mr. Dineros has never participated in extra-detail assignments. In answer to the Investigator's question, "Has Mr. Dineros participated in the extra-detail program, Mr. Holland replied: "No, he just became a Section Chief. Some are better speakers than others, but we expect all to participate." (Complaint File, Exhibit 2, p. 41).

Neither the complaint file nor Mr. Dineros' OPF contains evidence that he participated in any self-development activities related to supervision, prior to his selection for the position.

Complainant's OPF contains the following documentation of her administration of formal and informal training to Veterans Administration employees as well as to persons outside the Agency: (1) On March 14, 1972, Mr. Holland wrote a memo expressing "his appreciation to [her] for participating as a discussion leader in the March 9 group meeting which was held to tell interested Regional Office employees from other Divisions about the Adjudication Division." (2) The Director of Los Angeles City College sent her a letter on December 3, 1970, expressing his gratitude for her significant contribution to the Veterans'-Staff Training Program. The letter continued, "The eval-

uation forms which our participants completed on the last day of the 5-day training program reveal how grateful the delegates were for the information you were able to give them." (3) A quality step increase granted to Complainant in August 1970 recognized her for her effective working relationships. The justification for the award states in part, "Mrs. Chandler as a group leader has supervision of Claims Examiners and Clerks and is responsible for the timely processing of a work load digit assignment. Her supervisory techniques and highly effective relationship with the group personnel results in high productivity, timely processing, minimum errors and excellent morale. During daily operations I find Mrs. Chandler's group current as to work load processing and very seldom is it necessary to level cases from her group to others. On the contrary, I frequently find it necessary to distribute cases to Mrs. Chandler in an effort to maintain currency of operations within the Section. . . .

The award continues, "In early June plans were made to hire 30 law students to aid in the processing of the summer enrollments. Due to Mrs. Chandler's exceptional working knowledge of VA procedures and ability to instruct personnel, we selected her as principal instructor and supervisor of the training group responsible for orientation and training of the temporary employees . . . Mrs. Chandler has very effectively presented a comprehensive training program which has resulted in a group of well-trained individuals . . . As a result of Mrs. Chandler's determined effort, we have been able to process the summer peak enrollment work-load with minimum delay. This has resulted in timely payments to students, minimum inquiries regarding delinquent payments, good public relations, and other tangible benefits. Her performance as training supervisor has been exceptional." (4) On January 28, 1970, Authorization Section Chief-E (Mrs. Margarette Fillerup) commended Complainant in a memo which states in part: "During recent months, your group has kept current considering the 7-day timeliness factor. This is due primarily to your good screening techniques in handling the incoming case-load and industry in processing the cases assigned." On a separate matter, the commendation states: "The one hour instruction on 3101 processing given by you to 24 Adjudication employees was reported to be well received. Your efforts in presenting this important phase of our operation in a clear and concise fashion are appreciated and you are commended." (5) A memo was sent to Mrs. Chandler in May 1969, from Adjudication Officer (M. C. Holland), thanking her for her participation in the Claims Clerk Refresher Training Program. Mr. Holland commends her in the following words: "Your lucid and well-prepared presentation covering the processing of educational assistance claims should prove of material assistance to our Claims Clerks in becoming more proficient in this area." (6) There is a commendation memo to Mrs. Chandler from Authorization Section Chief, Section B (Mrs. Fillerup), dated August 14, 1968, stating "Your cheerful acceptance of extra assignments beyond that of routine adjudication has helped immeasurably to boost morale within the Section." (7) A commendation memo dated November 20, 1967 to Mrs. Chandler from Authorization Section Chief, Section B (Dominic Ballanti) states, "you are to be commended on the spirit of cooperativeness you have displayed during the period you served this Fall as a supervisor in training personnel in education awards. Your knowledge of educational awards, willingness to help others learn, and your effectiveness in getting the task done is greatly appreciated." (8) Although the QSI granted Complainant on October 20, 1972 comes after the promotion action in issue, it is relevant to the extent that it recognizes her for performance before the promotion action of September 17, 1972. The period covered by the recommendation for the QSI is October 1, 1971 to September 30, 1972. The following statements are included in the justification for that award: "Mrs. Chandler has an above aver-

age working knowledge of VA Laws, Regulations and procedures involved in reviewing and approving the work of Senior Adjudicators and Adjudicators in the Section." Mrs. Chandler's job knowledge and her exercise of sound judgment reduces errors and the consequent need for corrections. As an Authorizer she has manifested a high degree of technical knowledge. She has improve the quality of the decisions and actions taken by the Adjudicators working with her. Her guidance and wisdom have earned Mrs. Chandler a respected place in the eyes of her fellow workers."

There is also evidence in the file that Complainant participated extensively in extra-detail assignments.

The QSI which was awarded to her in August 1970 states, "I have observed that Mrs. Chandler has an excellent relationship with personnel within our Division as well as other Divisions. Her contacts with claimants and schools are courteous and cordial which without a doubt improves the image of the VA with the general public. Mrs. Chandler because of her excellent background and knowledge combined with ability to express herself, has frequently been called upon to participate in staff discussions within the regional office. On occasion she has also participated in panel discussions in the news media, including television." (The award justification appears under Complaint File, Exhibit 37). Mr. Holland testified at the hearing that Mrs. Chandler had been sent on extra-details and "comes across well, has a good manner, and does a fine job" (Complaint File, Exhibit 2, p. 5). Mr. Ballanti, speaking of Complainant's performance on extra-detail assignments said, "Having been at these meetings with you, from the way you conducted yourself, the way you handle people, you are definitely a natural for this type of thing." (Hearing Transcript, p. 30).

Two VA Forms 5-4627 (Cumulative Record of Training and Development) in Mrs. Chandler's OPF indicate that

she has had the following courses which relate either directly or closely, to supervision:

1—Performance Evaluation Training

2—Improving Communications with the Public

3—Paid Supervisory Training

4—Creative Problem-Solving

5—Supervising Women for Women

6—Human Factors in Management

It appears that much of what the Complainant did is not only closely associated with supervision but relates directly to the GS-13 Supervisory Veterans Claims Examiner position for which she applied. The position description requires the incumbent to "maintain a satisfactory relationship with employees, staff officials, representatives of other government agencies, Veterans Service Organizations, representatives of organizations doing business with the Veterans Administration and with the general public." (Complaint File, Exhibit 25).

A preponderance of the evidence supports a finding that Complainant, at the time of the promotion action had demonstrated, in greater breadth than Mr. Dineros, her "potential" to perform in a supervisory capacity.

Allegation 3. Mr. Holland stated in his affidavit (Complaint File, Exhibit 2, p. 4) that he definitely checked the sick leave balances of the candidates in this promotion and that he always checks sick leave balances. He stated also, "on the surface, it appeared that Mrs. Chandler's balance was better. But I checked Mr. Dineros' case and found he had used very little sick leave during the past year. He, apparently, had used a lot due to some illnesses in the past." He made substantially the same statement at the hearing (Hearing Transcript, p. 17), saying ". . . while [Mr. Din-

eros'] balance was not high, his sick leave usage for the preceding 12 months had been very low."

A memorandum from Mr. Holland to the Investigator in this complaint, dated October 13, 1972 (Complaint File, Exhibit 29), shows that Mrs. Chandler had a sick leave balance of 999 hours and Mr. Dineros 348 hours. There is no reason to discount Mr. Holland's statement that he reviewed and considered sick leave balances before making a selection from the candidates referred to him. Therefore, I find that Mr. Holland did review Complainant's sick leave balance before making a selection for the position. (This finding is not intended to reflect an opinion by the Examiner that such a practice is a good practice).

Allegation 4. Mr. Holland stated in his affidavit that he assumed Mr. Dineros could read and interpret printouts. (Complaint File, Exhibit 2, p. 6). In answer to further questioning at the hearing on this matter, Mr. Holland said that he did not question candidates about their ability to read computer printouts. He said that he did not know at the time of the selection whether Mr. Dineros could read printouts (Hearing Transcript, p. 22), although it is conceded by him that Section Chiefs should be able to read and interpret computer printouts. (Complaint File, Exhibit 2, p. 6).

Complainant's OPF contains a letter dated July 13, 1971 from Field Director, Area 4, Department of Veterans Benefits, Washington, D. C. commending her for her participation in test of the OCR (Optical Character Recognition) award procedure. The letter states, in part, "We would like to ask that she return for a short period about August 2, 1971, to assist in analyzing and evaluating the output from the computer based on the input data supplied during the week of June 28, 1971."

The VA Promotion Plan requires that the selecting official review the Official Personnel Folders of all employees

referred for interview. (Complaint File, Exhibit 27, p. 8). Since the Complainant was referred for interview, we assume that the selecting official reviewed her OPF. Assuming that he made the review, the letter could have given him some proof of her ability to read and interpret computer printouts. There is nothing in the complaint file or in Mr. Dineros' OPF which would give rise to more than an assumption that he could read and interpret printouts at the time Mr. Holland selected him for the position. Mr. Holland says that Authorizers and Adjudicators should be able to read computer printouts (Complaint File, Exhibit 2, p. 6).

While I cannot conclude on the state of the evidence that Mr. Dineros lacked the ability to read and interpret computer printouts at the time of his selection, I do conclude that the selecting official should have known, as a matter of fact, whether Mr. Dineros had that ability, since it is admitted to be an ability a Section Chief needs. It is clear that Complainant could read and interpret computer printouts.

Allegation 5. Mr. Holland testified that nine of eleven Section Chiefs he supervises do not have law degrees. He also testified that the VA Regional Office, Los Angeles has established law courses for Adjudication Division employees without law degrees in order to give them some familiarity with our system of jurisprudence and to acquaint them with the analytical reasoning process required in law (Hearing Transcript, pp. 21-22). The Complainant does not have a law degree but has completed the course established for employees without degrees. Mr. Dineros has a law degree.

Mr. Holland stated in his affidavit that although a law degree is not necessary for a Section Chief position, it is desirable. He said further, "If we have someone with a law degree, who shows promise, his promotions probably will come faster than if he didn't have it." (Complaint

File, Exhibit 2, pp. 5, 6). However, several other statements by Mr. Holland in the record indicate that he primarily based his selection of Mr. Dineros on his ability "to train, motivate and inspire employees." (Hearing Transcript, pp. 15, 20, 23).

The evidence does not allow a finding that Mr. Holland used Mr. Dineros' law degree to justify selecting him for the Section Chief position.

Allegation 6. At the present time, Mr. Holland supervises two female Section Chiefs, both GS-13, both Caucasian—Mrs. Catherine Weden and Mrs. Margarette Fillerup. Neither of them was selected by him. He stated in his affidavit (Complaint File, Exhibit 2, p. 4): "Mrs. Fillerup was a Section Chief when I came; Mrs. Weden had been an Authorizer and was the Assistant Chief of the Administrative Division. I did concur in her lateral transfer back to Adjudication." Both Mrs. Weden (Hearing Transcript, p. 53) and Mrs. Fillerup (Hearing Transcript, p. 42) testified that Mr. Holland has not treated them differently than their male supervisory peers in terms of official assignments.

From approximately March 1971 to September 1972 (when Mr. Dineros was selected), Mr. Holland participated as selecting official in three promotion actions for GS-13 Supervisory Veterans Claims Examiners. The selections for these positions were made under Promotional Announcements 36-71 and 47-72. Under Announcement 36-71, a Caucasion male was selected; an Oriental male and a Caucasian male were selected under 47-72. (See Hearing Exhibit #1).

When asked what specific qualifications he wanted of the GS-13 Section Chief, Mr. Holland responded: "the individual should be knowledgeable; *he* should have a good knowledge of the work that the people will be performing. He should be able to work with people, to motivate them

and he should be in a position to solve problems." (Hearing Transcript, p. 20).

When the selecting official was asked whether Complainant was deficient in any qualifications he wanted his Section Chief to possess, he responded: "I wouldn't say she was lacking. I would say, in my opinion, in ability to motivate and get along with people I figured Mr. Dineros could do a better job."

Mr. Holland stated in his affidavit: "I'm interested in getting Section Chiefs who will do the best job for the Division. He must know the job, but also must be able to motivate and inspire his staff. I'm not at all concerned with race or sex in filling these positions but only in finding the one who will do the best job." (Complaint File, Exhibit 2, p. 3).

A review of Forms VA 5-4669 (Qualifications Analysis and Assessment of Potential for Supervisory Positions) prepared on Complainant and Mr. Dineros for Announcements 80-72 (the promotion action in question) and 47-72 (an earlier promotion action) reveals that in each promotion action the Complainant was rated one point better than Mr. Dineros in ability to "motivate, train, develop, and guide employees of varied backgrounds and skill levels effectively." Mrs. Fillerup, Mr. Dineros' immediate supervisor, prepared his Forms 5-4669; Mrs. Chandler's were prepared by her immediate supervisor, Gilbert Thompson. The selecting official testified that he knew the supervisory evaluations of the candidates (Hearing Transcript, p. 24).

The evidence shows that during a one-and-a-half year period of time, Mr. Holland did not select a female supervisory staff member. On the three occasions which arose for selecting supervisory Veterans Claims Examiners, he did choose males. This information is hardly indicative enough of a pattern to justify any inferences about Mr. Holland's attitude toward selecting women for supervisory

positions. However, there are other indicators that Mr. Holland had a predisposition for males in supervisory positions:

1. Granted that traditional rules of English grammar approve a generic use of "he" and "his" in proper settings, Mr. Holland's use of "he" and "his" in unnatural settings (pointed out earlier in this decision) indicate that he held preconceived notions about which sex of individuals ought to be in supervisory positions;

2. In spite of the fact that Complainant had demonstrated ability to motivate, train and inspire employees on many more occasions than Mr. Dineros, and in spite of the fact that the Complainant received a better rating in this area than Mr. Dineros, Mr. Holland selected the latter and justified his selection by pointing to his demonstrated ability "to motivate people and get along with them" (Hearing Transcript, p. 23).

3. In spite of Complainant's demonstrated ability to handle extra-detail assignments which are admittedly part of the Section Chief's job, Mr. Holland selected a male who had never performed such assignments.

Recommended Decision

It is my finding that a preponderance of the overall evidence justifies a conclusion that the selecting official discriminated against Complainant because of her sex in not selecting her for the GS-13 Section Chief position. The evidence does not indicate that Complainant's race influenced the decision not to select her for the position.

Recommended Action

I recommend that Complainant be promoted immediately to GS-13 Supervisory Veterans Claims Examiner, effective retroactively to September 17, 1972. When the Agency considers Complainant in future promotion actions, Com-

plainant should receive experience credit as if she *actually occupied* the GS-13 Section Chief position on September 17, 1972.

Further Recommended Action

Factors used in evaluating and selecting candidates for promotion should reflect merit principles. As a rule, there is no correlation between an employee's sick leave balance and ability to perform a job.

A sick leave balance represents only an aggregate number of hours available to be used on occasions where sick leave is warranted. A *balance* says nothing about reasons the balance is low or high or whether the employee has abused leave privileges. Both good employees and poor employees use sick leave.

A sick leave balance simply does not allow one to infer much about an employee's ability. Accordingly, I recommend that the practice of considering sick leave balances in merit promotion actions be discontinued.

/s/ Edna E. J. Francis
Edna E. J. Francis
EEO Complaints Examiner

VETERANS ADMINISTRATION DECISION

VETERANS ADMINISTRATION
Office of General Counsel
WASHINGTON, D.C. 20420

CERTIFIED MAIL

March 21, 1973

Mrs. Jewell D. Chandler
5719 Aladdin Street
Los Angeles, California 90008

Dear Mrs. Chandler:

I am enclosing a copy of the Hearing Transcript and the EEO Complaints Examiner's report concerning your complaint of discrimination because of race or color (Black) and sex (female) filed against the VA Regional Office, Los Angeles, California.

After a careful review of the case record, I concur, in general, with the EEO Complaints Examiner's report. However, the record does not support the EEO Complaints Examiner's Recommended Decision that a preponderance of the overall evidence justifies a conclusion that the selecting official discriminated against you because of your sex in not selecting you for the GS-13 Section Chief position. We do concur with that part of the EEO Complaints Examiner's decision which states that the evidence does not indicate that race influenced the decision not to select you for the position.

In supporting our conclusions, the case will be considered on a breakdown of the allegations in the same format followed by the EEO Complaints Examiner. These allegations to support your complaint of discrimination are:

(1) that she had demonstrated technical proficiency in the three main areas of responsibility for the Section Chief position (compensation, pension, and education claims) whereas the male selected for the position had not demonstrated technical proficiency in all three areas;

(2) that she did not receive due consideration for her "potential" to perform in a supervisory capacity, inasmuch as she had frequently performed many of the responsibilities associated with supervision whereas the male selected for the position had rarely performed supervisory responsibilities and therefore had not demonstrated "potential";

(3) that she was not given due credit for her sick leave balance, as required by the VA Promotion Plan;

(4) that she had the ability to read computer printouts, an ability which is needed in the supervisory position, whereas the male selected for the position lacked that ability at the time of his selection;

(5) that the selecting official gave disproportionate weight to the significance of a law degree, because it enhanced his justification for selecting a male for the position;

(6) that the selecting official had never selected a female for a GS-13 position, and did not wish to select a female supervisor, especially not a black female, for the GS-13 Section Chief position.

In analyzing allegation (1), the facts in the record support a conclusion that you demonstrated a higher degree of technical proficiency in the area of education claims, but does not support any greater proficiency in the areas of compensation and pension. I could find no facts supporting your claim that "the male" selected for the position had not demonstrated technical proficiency in all three areas.

In reference to allegation (2), regarding demonstrated potential for supervisory personnel, it is agreed that the testimony of record supports your claim of a greater breadth in training, extra-detail assignments and self-development activities. While these assignments are valuable in developing an individual for the assumption of supervisory responsibilities, the utilization of these details and self-development opportunities do not of themselves sup-

port a conclusion that you possess an overall "greater breadth of potential" to perform in a supervisory capacity.

We concur with the Complaints Examiner's conclusions with respect to allegation (3), allegation (4) and allegation (5).

In reference to allegation (6), it is shown that during a one and a half year period of time, the selecting official did not select a female supervisor. During this period he had the opportunity on only three occasions. We concur with the Complaints Examiner's conclusion that this is not indicative enough of a pattern to support any inference regarding the selecting official's attitude towards the selection or nonselection of women for supervisory positions. However, we do not agree that the record contains other indications that the selecting official had a predisposition for males in supervisory positions. The selecting official's usage of "he" or "his" are not to be construed as importing only the masculine gender since the terms include the feminine as well. Authority: 1 U.S.C. 1.

The selecting official is entitled to make his selection from any of the candidates on a promotion certificate, whether or not the candidates are presented in rank order, based on his judgment of how well the candidates will perform in the particular job being filled, and, when relative, what their potential is for future advancement. Authority: Federal Personnel Manual, Chapter 335, subchapter 3, paragraph 3.7c. The record is absolutely void of any evidence or testimony in reference to any acts, words, or innuendos, discriminatory in nature, by the selecting official, relating to his selection from the certificate of eligibles furnished him.

It is therefore my decision that discrimination because of race or color (Black) and sex (female) is not substantiated by the evidence concerning the issues raised in your complaint.

If you are dissatisfied with this final decision, you have the following appeal rights:

You may appeal to the Chairman, Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C., 20415, within 15 calendar days of receipt of the decision.

You may file a civil action in an appropriate U. S. District Court within 30 days of receipt of the Commission's final decision.

If you elect to appeal to the Commission, a civil action in a U. S. District Court may be filed within 30 days of receipt of the Commission's final decision.

A civil action may also be filed anytime after 180 days of the date of initial appeal to the Commission if there has not been a final decision rendered.

Sincerely yours,

/s/ KENNETH M. MEYER
Kenneth M. Meyer
Acting Assistant General Counsel

CIVIL SERVICE COMMISSION DECISION

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
WASHINGTON, D. C. 20415

IN THE MATTER OF: JEWELL D. CHANDLER

TYPE CASE: *Complaint of Discrimination (Race and Sex)*

INTRODUCTION

By letter dated April 3, 1973, complainant appealed to the Board of Appeals and Review from a decision of the Acting Assistant General Counsel, Veterans Administra-

tion, issued on or after March 20, 1973, wherein it was found that discrimination in a promotion action because of race or color (black) and sex (female) was not substantiated by the evidence.

Statement of the Case

Complainant is a GS-12 Veterans Claims Examiner in one of the Authorization Sections of the Adjudication Division, Veterans Administration Regional Office, Los Angeles, California. She received an appointment on April 24, 1966 in the Adjudication Division as a GS-7 Claims Clerk, was promoted to GS-9 Veterans Claims Examiner on October 8, 1967, advanced to GS-11 on June 15, 1969, and was promoted to her present position on March 21, 1971.

Complainant applied for a GS-13 Supervisory Claims Examiner (Section Chief) position under Promotional Announcement No. 80-72, which had a filing deadline of August 22, 1972. Although she was one of seven "highly qualified" candidates interviewed for the position, the selecting official chose a male Filipino-American who had been in the division in which the vacancy occurred about 13 years and a GS-12 Authorizer for about 5 years, and whose total score on the examination (167) exceeded complainant's by two points.

An Equal Employment Opportunity Counselor failed to informally resolve complainant's discrimination allegation, and on September 25, 1972, the complainant filed a formal complaint of sex and race discrimination against the selecting official. Based on an investigation conducted between October 10, 1972 and October 25, 1972, a report was submitted to the Equal Employment Opportunity Officer on the latter date, in which it was concluded that the evidence did not support the allegations of sex and race discrimination against complainant or general allegations of sex and race discrimination and inequality in employment in the Division, but that certain personnel practices

needed to be changed in order to alleviate such feelings among minority employees.

A copy of the report was provided complainant, but a satisfactory adjustment could not be achieved based on this report and complainant requested a hearing, which was held on January 26 and 29, 1973. The Complaints Examiner who held the hearing found that a preponderance of the overall evidence justified the conclusion that the selecting official had discriminated against complainant because of her sex in not selecting her for the GS-13 Section Chief position, but that the evidence did not indicate that complainant's race had influenced the decision.

The Complaints Examiner recommended that complainant be promoted retroactive to September 17, 1972, and that consideration of sick leave balances in merit promotion actions be discontinued. However, in his decision, the Acting Assistant General Counsel disagreed with the findings on three of the six allegations made by complainant and also found that the record did not support the conclusion that the selecting official had discriminated against complainant because of her sex.

Representations To The Board of Appeals and Review

Complainant requests that the Board of Appeals and Review concur in the recommendation of the Complaints Examiner. She takes issue with the findings of the agency on three of her allegations while reiterating her belief that the selecting official has discriminated on the basis of both race and sex. A copy of her letter of appeal was sent to the agency on May 2, 1973, but no response has been received from the agency.

Analysis and Findings

The record shows that the six allegations made by the complainant and considered by the Complaints Examiner and the agency are as follows:

(1) that she had demonstrated technical proficiency in the three main areas of responsibility for the Section Chief position (compensation, pension, and education claims) whereas the male selected for the position had not demonstrated technical proficiency in all three areas;

(2) that she did not receive due consideration for her "potential to perform in a supervisory capacity, inasmuch as she had frequently performed many of the responsibilities associated with supervision whereas the male selected for the position had rarely performed supervisory responsibilities and therefore had not demonstrated "potential";

(3) that she was not given due credit for her sick leave balance, as required by the agency's promotion plan;

(4) that she had the ability to read computer printouts, an ability which is needed in the supervisory position, whereas the male selected for the position lacked that ability at the time of his selection;

(5) that the selecting official gave disproportionate weight to the significance of a law degree, because it enhanced his justification for selecting a male for the position; and

(6) that the selecting official had never selected a female for a GS-13 position, and did not wish to select a female supervisor, especially not a black female, for the GS-13 Section Chief position.

The agency stated, with regard to complainant's allegation (1), that "I could find no facts supporting your claim that 'the male' selected for the position had not demonstrated proficiency in all three areas [of work in the section supervised by the selectee]." Complainant cites testimony by the selecting official and a section chief that the male selectee had not worked in the education claims adjudication area. The record shows that, while the selecting official testified at the hearing that the selectee had never worked in education claims adjudication, he also testified that the

selectee needed only to be "familiar enough [with the work performed in the section] to know what the employee is doing, changes going on, and know where to get the information if he does need it." The selecting official further testified that the selectee had an "overall familiarity" with education claims adjudication.

In its finding on complainant's allegation (2), namely, that she did not receive due consideration for her "potential" to perform in a supervisory capacity, the agency stated:

> . . . it is agreed that the testimony of record supports your claim of a greater breadth in training, extra-detail assignments and self-development activities. While these assignments are valuable in developing an individual for the assumption of supervisory responsibilities, the utilization of these details and self-development opportunities do not of themselves support a conclusion that you possess an overall "greater breath of potential" to perform in a supervisory capacity.

Complainant rejoins that she has actually been assigned and has performed the duties of a supervisor as shown by the testimony of a Section Chief. She also cites testimony of a co-worker that he had found complainant a better supervisor than selectee. The Board notes, however, that the selecting official testified at the hearing that he felt the selectee "could best do the job we needed done" and "could motivate people." While the complainant received a slightly higher overall rating on her appraisal for performance in supervisory positions (53 points on two occasions, as compared to 50 and 52 points received by the selectee), the Board does not believe that this, in itself, indicates that the complainant was better suited for the supervisory position in question, or that her nonselection necessarily was the result of discrimination on the basis of sex or race. In addition, the Board notes that the selectee received a more favorable rating than the complainant with respect

to ability to "motivate, train, develop, and guide employees of varied backgrounds and skill levels effectively".

The record shows that the agency concurred in the following findings of the Complaints Examiner with respect to complainant's third, fourth, and fifth allegations: (3) that the selecting official did review complainant's sick leave record before making his selection; (4) that, while the record did not show whether the selectee could read and interpret computer printouts at the time of his selection, the selecting official should have known (although he did not know) whether the selectee possessed this ability; and (5) that the evidence did not show that the selecting official used the selectee's possession of a law degree to justify the selection. The Board notes that complainant has raised no issue concerning these findings, and that the second finding described above does not, in itself, support a finding that the selection in question was based on considerations of race or sex.

Allegation (6) (that the selecting official had never selected a female for a GS-13 position and did not wish to select a female supervisor, especially a black female) was found supported by the Complaints Examiner, not because on 3 occasions over a 1½ year period the selecting official had selected 4 males, but because other alleged indicators showed that the selecting official has a "predisposition" for selecting males for supervisory positions. The Complaints Examiner considered that the 4 selections were too few instances over too short a period to be considered a pattern.

The agency disagreed that the cited indicators showed a predisposition for males in supervisory positions while complainant feels that the three occasions on which the Adjudication Officer selected 4 non-black males (2 Caucasians and 2 Orientals) does show a pattern of discrimination. She points out that, while possession of a law degree had been given as a reason for selecting her competitor,

on each of these occasions qualified blacks with law degrees were eligible candidates for promotion and were not selected. She cites as evidence of the selecting official's bias towards men his introductions of male officials to her as "Mr." whereas she was introduced to them without title. Complainant refers to testimony of two female Caucasian grade GS-9 Veterans Claims Examiners which allegedly shows the selection official's "practice in promoting males with little proven ability vs females with proven outstanding ability". She claims that the selecting official falsely rationalized his nonselection of blacks as supervisors on the ground that white employees will not accept supervision from a black employee.

The division in which the vacancy in question occurred has 276 employees, including 180 Caucasians, 69 Negroes and 27 of other minority designations. Hearing Exhibit #1 shows that during a 2-year period the selecting official had selected 83 employees for promotion including 41 Caucasians, 28 Negroes and 14 others. Thus, the 65% Caucasian workforce received only 50% of the promotions whereas the 25% Negro workforce received 34% of the promotions and the 10% other category received 16% of the promotions. However, of the 37 promotions to grades GS-9 through -13, Caucasians received 22 or 57%, Negroes received 8 or 22%, and 7 or 19% went to the other category. Complainant was 1 of the 2 blacks promoted to grade GS-12.

Of the 276 employees, 85 or 30% were female. Of the 83 promotions, 32 or 39% were received by females. However, of 37 promotions to grades GS-9 through -13, females received only 6 or 16%. Complainant was 1 of 2 women promoted to grade GS-12. Statistically, it is clear that as a black, and even more so as a female, complainant was in a category least likely to be promoted to a position at grade GS-9 or above.

The Personnel Management Specialist servicing the division testified that principal sources of Veterans Claims Examiners are eligibles for the Federal Service Entrance Examination (FSEE) who enter at grades GS-5 and -7 and Veterans Claims Clerks who begin at grade GS-3. There are relatively few minority or non-degree eligibles on the FSEE registers and a much higher proportion among clerical personnel. The promotion policy is to give preference to those with law degrees, and a much higher proportion of men than women employees of the division have law degrees. The reason for the seeming imbalance of women and blacks in the higher grade levels appears to be the preference in appointments and promotions given those with higher education, a legitimate qualifications matter and not a prohibited type of discrimination. The Board does not concur in the finding of the Complaints Examiner that the record shows that the selecting official is predisposed toward selecting men for supervisory positions.

To summarize, the main evidence that the selecting official discriminated against complainant in not selecting her over the male selectee is the inconsistency of his explanation that the main reason for the selection was his belief in the ability of the selectee to motivate employees whereas he had previously concurred in assigning complainant a higher rating on ability to motivate employees. The Board notes, however, that on the whole blacks and women have fared relatively well in promotions received in the division, and that there are two white female GS-13 Section Chiefs, one of whom received her position before the selecting official was assigned to his present position, but the other of whom was reassigned laterally with the concurrence of the person acting as selecting official for the promotion in question.

In view of the foregoing, the Board finds that the evidence of record does not support a finding that the agency's failure to promote the complainant resulted from discrimination on the basis of race or sex.

Decision

The previous decision of the Acting Assistant General Counsel, Veterans Administration, is hereby affirmed. Under the Civil Service Regulations, a decision of the Board of Appeals and Review is final and there is no further administrative appeal. However, if the complainant is not satisfied with this decision, she is authorized by Section 717(c) of the Civil Rights Act, as amended, to file a civil action in an appropriate U. S. District Court within thirty (30) calendar days of her receipt of this decision.

For the Commissioners:

/s/ William P. Berzak
William P. Berzak
Chairman

July 18, 1973

OPINION OF THE DISTRICT COURT
(Filed December 31, 1973)

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U.S. Attorney
Chief, Civil Division
REX HEESEMAN
Assistant U.S. Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-3551

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL No. 73-1863-MML

Findings of Fact and Conclusions of Law

JEWELL D. CHANDLER, *Plaintiff*,

v.

DONALD E. JOHNSON, ETC., ET AL., *Defendants*.

The Court, after a hearing on December 21, 1973, hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

Plaintiff, pursuant to Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. 2000e *et seq.*, instituted the instant action challenging the decision of defendants and

the Civil Service Commission that she was not discriminated against in the selection of a GS-13 Supervisory Claims Examiner at an office of the Veterans Administration (VA) in Los Angeles, California.

II

After plaintiff applied for said position, defendants followed an extensive procedure in ascertaining which of the many candidates should fill this position. Although plaintiff was one of several highly-qualified candidates, the selection official chose a male Filipino-American, Mr. Dineros.

III

An Equal Employment Opportunity Counselor failed to informally resolve plaintiff's discrimination allegation, and on September 25, 1972, plaintiff filed a formal complaint of sex and racial discrimination against the selection official, Mr. Holland.

IV

Based on an investigation, a report was submitted to the Equal Employment Opportunity Officer in which it was concluded that the evidence supported neither the allegations of sex and race discrimination against plaintiff, nor the allegation of general sex and race discrimination within the Division, but that certain personnel practices needed to be changed in order to alleviate such feelings among minority employees. A satisfactory adjustment could not be reached with plaintiff based on this report and she requested a hearing.

V

A hearing was held on January 26 and 29, 1973 wherein the Civil Service Complaints Examiner (Examiner) found that a preponderance of the over-all evidence justified the conclusion that the selecting official had discriminated

against plaintiff because of her sex in not selecting her for the GS-13 position, but that the evidence did not indicate that plaintiff's race had influenced the decision.

VI

On review, the VA's Acting Assistant General Counsel, Mr. Meyer, concluded that, while the record supported some of plaintiff's allegations and the Examiner's belief that the evidence did not indicate that race influenced the deci sion, the record failed to support plaintiff's other allegations and the Examiner's recommended decision that a preponderance of the over-all evidence justified a conclusion that the selecting official discriminated against plaintiff because of her sex. In this regard, the Examiner's recommended decision was overturned.

VII

On April 3, 1973, plaintiff appealed the VA's decision to the Board of Appeals and Review of the United States Civil Service Commission. The Board affirmed the VA's decision on June 12, 1973.

VIII

Plaintiff thereafter filed the instant action.

CONCLUSIONS OF LAW

I

The Court has jurisdiction over the parties and the subject matter of the instant action. (Defendants challenged, by means of a motion to dismiss, the inclusion of two of the named defendants; the Court does not reach this matter because of the disposition of this case as stated herein.)

II

The scope of judicial review in Section 2000e-16 cases has not been litigated to a great extent since the enactment

of this legislation. After reviewing the existing authorities and the legislative history, the Court is persuaded by the rationale of *Hackley* v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973) and accordingly adopts the scope of judicial review expressed in that case.

III

Applying the preceding scope of judicial review to the instant action, the Court finds that the absence of discrimination is firmly established by the clear weight of the administrative record and hence plaintiff is not entitled to any relief.

IV

The Court concludes that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law. Judgment should therefore be entered in favor of defendants and against plaintiff.

DATED: This 27 day of December, 1973.

/s/ MALCOLM M. LUCAS
Malcolm M. Lucas
United States District Judge

PRESENTED BY:

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U.S. Attorney
Chief, Civil Division
REX HEESEMAN
Assistant U.S. Attorney

Attorneys for Defendants

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1596

OPINION

JEWELL D. CHANDLER, *Appellant*,

v.

DONALD E. JOHNSON, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF VETERANS AFFAIRS, VETERANS ADMINISTRATION; GORDON R. ELLIOTT, IN HIS OFFICIAL CAPACITY AS DIRECTOR, VETERANS ADMINISTRATION, LOS ANGELES REGIONAL OFFICE; MARTIN C. HOLLAND, IN HIS OFFICIAL CAPACITY AS ADJUDICATIONS OFFICER, VETERANS ADMINISTRATION, LOS ANGELES REGIONAL OFFICE; AND THE UNITED STATES OF AMERICA, *Appellees*.

[April 25, 1975]

Appeal from the United States District Court
for the Central District of California

Before: TRASK, CHOY, *and* GOODWIN, *Circuit Judges*.

GOODWIN, *Circuit Judge*:

Jewell Chandler, a black, female employee of the Veterans Administration, appeals from a summary judgment denying judicial relief under Section 717 of Title VII of the Civil Rights Act of 1964, as added by Section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16.

Appellant alleges that the VA denied her a promotion because of her sex and race. She exhausted her administrative remedies within the VA and the Civil Service Commission before beginning this action. The district court found no substantial defects in the agency proceedings.

Appellant has been employed since 1966 in the Adjudication Division, Los Angeles Region. She received five promotions in six years. In 1972, she was one of seven examiners (GS-12) interviewed for the position of Supervisory Veterans Claims Examiner (GS-13). Appellant was one of three finalists, but a Filipino-American male received the promotion.

In a two-day hearing called pursuant to 5 C.F.R. §713.217, a complaints examiner heard ten witnesses. Other witnesses requested by appellant were not called because she did not show that they would add anything material to the record. Appellant chose to represent herself. She failed to produce objective evidence of discrimination, but the complaints examiner, in a twenty-page recommended decision, concluded that appellant was better qualified for the promotion than the person selected. The examiner found that the selecting official had discriminated against appellant because of her sex. The examiner found no evidence of racial bias. The decision recommended that appellant be promoted to the GS-13 position retroactively to September 17, 1972.

Pursuant to Civil Service regulations, the recommended decision and the hearing record were sent to the head of the VA for final agency decision. In a letter dated March 21, 1973, Mr. Kenneth Meyer, acting assistant general counsel of the VA, rejected the complaints examiner's recommendation, stating that the finding of sex discrimination was not "substantiated by the evidence."

Appellant appealed to the Civil Service Commission Board of Appeals and Review. On July 18, 1973, the board affirmed the agency decision. This litigation followed.

The appellant raises four questions: (1) Whether the delegation of reviewing authority within the VA to the assistant general counsel constituted a fatal defect in the administrative review. (2) The legal sufficiency of the assistant general counsel's reasons for rejecting the claim.

(3) The sufficiency of the administrative record. (4) The right to trial de novo in the district court.

I.

While there may have been some ambiguity in VA regulations at the time the acting assistant general counsel rejected appellant's claim, a matter we need not decide, we can find no substantive reason for holding that the delegation of reviewing authority "to the general counsel or his designee" denied the appellant the quality of agency review contemplated in the regulations implementing Title VII.

A CSC regulation, 5 C.F.R. § 713.221(a), provides that when an alleged violation of Title VII occurs in a federal agency, the head of the agency *or his designee* shall decide whether the agency will adopt, reject, or adopt with modifications the recommended decision of the complaints examiner. A VA regulation, 38 C.F.R. § 2.6(e)(6), delegated Title VII authority from the agency head to the general counsel or *his* designee. If there were, as appellant claims, inconsistent regulations in effect in 1973, she has not cited the C.F.R. references, and the government represents that the inconsistencies, if any, have been cured. In any event, the delegation question presents nothing of substance in this case.

Appellant relies on *United States* v. *King*, 478 F.2d 494 (9th Cir.), *cert. denied, sub nom. Light* v. *United States*, 414 U.S. 846 (1973), where we held that statutory guidelines in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2516, prohibit the attorney general and his specially designated assistant attorneys general from redelegating the authority to authorize wiretaps. Here, unlike in *King*, we find no evidence of a legislative policy to limit reviewing authority to specific officials or to officials of a specific level in the bureaucracy. Indeed, it would be counterproductive and unnecessarily restrictive to subject government-employee Title VII cases to uncertainty and

delay in exhausting administrative remedies because of a nonprejudicial ambiguity in the delegation of reviewing authority within the agency. The district court was correct in refusing to find a fatal defect in the agency's delegation procedure.

II.

Appellant next asserts that the decision letter by which she received notice of final agency action rejecting her claim was fatally defective because it did not "set forth the specific reasons in detail for rejection * * *." 5 C.F.R. §713.221(b)(2).

Appellant also contends that she made at least a prima facie case before the complaints examiner, as demonstrated by the examiner's finding of discrimination. (When an employee establishes a prima facie case of discrimination, the employer must articulate some "legitimate, non-discriminatory reason" for its action. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).)

Appellant points to the statement in the decision letter that "the record is absolutely void of any evidence or testimony in reference to any acts, words, or innuendos, discriminatory in nature, by the selecting official * * *," as evidence that Mr. Meyer rejected the complaints examiner's recommended decision for the wrong reason, *i.e.*, because appellant had failed to prove a specific overt intent to discriminate. (Title VII proscribes "subtle as well as overt discrimination, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 801, and it forbids employment practices with discriminatory consequences as well as discriminatory designs. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).)

Appellant is correct in asserting that she was entitled to an affirmative statement of nondiscriminatory reasons for the selection of another applicant. She is also correct in her assertion that she was under no duty to prove a specific

intent to discriminate against her. However, the Meyer letter, as well as other documents in the administrative file, contains statements of nondiscriminatory reasons for the VA decision, and the administrative record on the whole shows that appellant did not lose her case because of an erroneous belief by Mr. Meyer that she had a higher burden of proof than the law requires.

Notwithstanding any flaws in the Meyer letter, the administrative record showed that the man who was promoted had several years of seniority both in grade and in the division, and a numerical score two points higher than appellant's on a grading system that was not shown to have been discriminatory. The Civil Service Commission Board of Appeals and Review noted these points in its decision, which was a part of the administrative record examined by the district court. These points constituted a legitimate, nondiscriminatory reason for the challenged personnel action.

Indeed, other than the facts that appellant was female and that the person promoted was male, there was no evidence to support appellant's assertion of sex discrimination. She testified at length about her opinions on racial discrimination, as did her supporting witnesses, but no witness produced evidence that would support a claim of sex discrimination. The examiner rejected the claim of racial discrimination.

The examiner allowed the claim of sex discrimination on the basis of unexplained statistics. Three persons, all male, were promoted from grade 12 to grade 13 during the 18 months in which the supervisor whose decision was challenged had the principal responsibility in such promotions. There was no evidence, however, to rebut the supervisor's statement that those promoted were the best qualified. There was no evidence that qualified women even competed for these promotions, much less that any qualified woman was rejected in favor of a less qualified man.

Every reviewing authority, plus the district court, has agreed that the record made before the complaints examiner did not support the finding of sexual discrimination. And the complaints examiner correctly found no basis for the allegation of racial bias.

We have examined the record, and we agree that there is no substantial evidence to support appellant's claims. Appellant's opinion and the opinions of those who agree with her add nothing to the allegations in the complaint. In view of our conclusion that appellant's charges before the examiner were fully answered by the evidence presented by the VA, the district court correctly held that the administrative decisions were not so defective in their form, or so unsupported by the record, as to require the court to set them aside.

III.

The appellant contends that, whether or not the administrative proceedings satisfied the requirements of Title VII, she is entitled to a trial de novo in the district court. She also contends that, at a minimum, she is entitled to an opportunity in court to supplement the administrative record.

The VA contends that the district court's role is limited to review of the administrative decision to assure that it was not arbitrary or capricious, that there were no procedural infirmities, and that it is supported by substantial evidence.

The district court correctly rejected both polar positions. It adopted and applied the intermediate scope of inquiry expounded in *Hackley* v. *Johnson,* 360 F. Supp. 1247 (D.D.C. 1973), *appeal pending, sub nom. Hackley* v. *Roudebush* (D.C. Cir. No. 73-2072).

Both parties and amicus curiae thoroughly briefed the complicated legislative history of § 717, which in 1972 ex-

tended the protections of Title VII of the Civil Rights Act of 1964 to federal employees. After careful examination of the statute and its legislative history, we agree with the *Hackley* trial court that if Congress had any intent on the role of the district courts in § 717 cases, it failed to disclose it. *See Hackley* v. *Johnson,* 360 F.Supp. at 1250.

The district court's role in Title VII actions by federal employees is not the same as that in Title VII actions by private employees. A private employee is entitled to a plenary hearing. *McDonnell Douglas* v. *Green,* 411 U.S. at 798-799; *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974).

We believe Congress intended to assure federal and private employees equivalent, but not identical, judicial remedies under Title VII. The remedies differ because Congress created different administrative processes for these two classes of employees. *Cf. Bowers* v. *Campbell, et al.,* .... F.2d .... (9th Cir. October 24, 1974).

With this objective in mind, the district judge faced with a demand for a trial de novo is entitled to determine, at a pretrial conference or otherwise, why the plaintiff believes that a trial de novo is necessary. Without, at this time, attempting to canvass all the possibilities in this rapidly expanding branch of the law, a plaintiff might show that the administrative record is inadequate, or that the hearing officer cut short the proceedings in a manner that prevented a fair presentation of the plaintiff's case; or that without judicial discovery, a case could not be made. Other possibilities will no doubt be advanced.

Here, the district court was presented with a verbatim transcript of a hearing and a comprehensive civil service review. There was no material flaw in the administrative record on its face; and nothing of substance in appellant's challenge to the administrative proceedings. There was nothing before the district court to indicate that a useful purpose would be served by having a trial de novo. We find

no abuse of discretion in the decision not to have a trial de novo.

On the score of reopening the record to permit the taking of more testimony, again appellant presented nothing before the district court to indicate that a reopening would produce anything of substance. Additional opinions of coworkers (that members of minority races did not fare as well in promotions as did whites) might have been brought in. But to the extent that this observation may have been relevant, it was fully explored in the administrative hearing. Again, there was no offer of proof or suggestion that new and material evidence likely to produce a different result would be forthcoming if the record were reopened. Accordingly, we find no abuse of discretion in the decision by the district court not to reopen the administrative record.

Where the administrative record affirmatively shows, as it did here, that the challenged personnel action was based upon nondiscriminatory reasons; and where, as here, the record on its face appears to be the product of a fair and impartial hearing; and where, as here, the appellant fails to point out a prejudicial defect in procedure or evidentiary deficits that should be remedied in court, the district court commits no error in deciding the case on the administrative record.

Affirmed.

OPINION OF THE THIRD CIRCUIT IN SPERLING v. UNITED STATES

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1533

ANTON E. SPERLING
70 Reeds Road, New Shrewsbury, New Jersey 07724
Appellant,

v.

UNITED STATES OF AMERICA
c/o Attorney General
Washington, D.C. 20415

ROBERT F. FROEHLKE
Secretary of the Army
The Pentagon
Washington, D.C. 20301

ROBERT E. HAMPTON, *Chairman*
U.S. Civil Service Commission
1900 E Street, N.W.
Washington, D.C. 20415

MAJOR GENERAL HUGH F. FOSTER, JR.
Commanding General
U.S. Army Electronics Command
Fort Monmouth, New Jersey 07703

MALCOLM R. MACKENZIE
Civilian Personnel Officer
U.S. Army Electronics Command
Fort Monmouth, New Jersey 07703

EDWARD M. KRONISCH
Project Managers Office
AACOMS, Building 2525, U.S. Army Electronics Command,
Fort Monmouth, New Jersey 07703

and LUDWIG J. ANDOLSEK, and JAYNE BAKER SPAIN, the *Vice Chairman* and *Commissioner* respectively of the United States Civil Service Commission, 1900 E Street, N.W., Washington, D.C. 20415
Appellees

(D.C. Civil Action No. 1403-72)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSEPH MEEHAN, Esquire
P.O. Box 664
40 Memorial Parkway
Long Branch, New Jersey 07740
Attorney for Appellant

JONATHAN L. GOLDSTEIN,
United States Attorney
GEORGE E. MITTELHOLZER,
Asst. United States Attorney
Federal Building
970 Broad Street
Newark, New Jersey 07101
Attorneys for Appellees

Argued January 24, 1975

Before: VAN DUSEN, GIBBONS and HUNTER, *Circuit Judges*

OPINION OF THE COURT

(Filed April 18, 1975)

GIBBONS, *Circuit Judge*

This appeal, involving a claim of job discrimination by the federal government, brings before us for the first time important questions concerning the proper construction and application of the civil remedy afforded to federal

employees in the district courts by § 717(c) of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111, 42 U.S.C. § 2000e-16(c), *amending* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255, 42 U.S.C. § 2000e *et seq.*

The Act mandates that all personnel actions affecting employment in the federal government are to be free from discrimination based on race, color, religion, sex, or national origin,[1] and provides the Civil Service Commission with broad remedial authority to insure that this explicit mandate will be carried out. The Act designates the Civil Service Commission as the administrative agency to review the claims of aggrieved federal employees or applicants for federal employment.[2] Recognizing that private sector employees dissatisfied with the fact-finding or the conciliation procedures of the Equal Employment Opportunity Commission (EEOC) in Title VII actions are authorized to press their claims in the federal district courts, 42 U.S.C. § 2000e-5(f)-(k), the Act also provides a civil remedy in the district courts to federal employees dissatisfied with Civil Service Commission (CSC) review of their claims.[3]

---

[1] § 717(a), 42 U.S.C. § 2000e-16(a) provides in part:

"All personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."

[2] § 717(b), 42 U.S.C. § 2000e-16(b) provides in part:

"Except as otherwise provided in this subsection, the Civil Service Comission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. . . ."

[3] § 717(c), 42 U.S.C. § 2000e-16(c) provides:

"Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

§ 717(d), 42 U.S.C. § 2000e-16(d) provides:

"The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."

Appellant Anton E. Sperling, a career employee in federal service filed suit in the district court pursuant to § 717(c). He appeals here from an order of the district court which granted the government's motion for summary judgment. Sperling had been employed as a civilian writer by the United States Army Electronic Command at Fort Monmouth, New Jersey (ECOM) since 1957. At ECOM, Sperling served as Executive Vice-President of Lodge 1904 of the American Federation of Government Employees (AFL-CIO), and as the union's grievance representative in Equal Employment Opportunity proceedings at the Fort. In that capacity, Sperling, a white man, represented a black ECOM employee in a series of discrimination grievance proceedings from 1965 through 1967. Sperling claims that he was denied a promotion to a GS-13 position in November, 1968, in retaliation for his successful representation, as union grievance delegate, of the black ECOM employee. Sperling pressed his own claim through the administrative process by filing a series of five complaints between March, 1968 and October, 1969, culminating in an

adverse decision by the Board of Appeals and Review of the United States Civil Service Commission on July 15, 1972. On August 15, 1972 he filed suit in district court.

Sperling's amended complaint joins as defendants the Secretary of the Army, civilian and military personnel employed by the Department of the Army, the Commissioners of the United States Civil Service Commission, and the United States. The principal relief sought is a retroactive promotion to a GS-13 employment level together with back pay, and all other attendant rights and benefits for that level from December, 1968. Sperling also seeks an award of counsel fees.

Jurisdiction before the district court was alleged pursuant to the Federal question statute, 28 U.S.C. § 1331; the Civil Rights Act, 28 U.S.C. § 1343; the Tucker Act, 28 U.S.C. § 1346(a)(2); the Mandamus Statute, 28 U.S.C. § 1361; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; the Administrative Procedure Act, 5 U.S.C. § 702; the Back Pay Act, 5 U.S.C. § 5596; and the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16.

On August 20, 1973, the government moved to dismiss Sperling's complaint for failure to state a claim upon which relief could be granted, and, alternatively, moved for summary judgment. Sperling opposed the government's motions, and on October 16, 1973, filed a cross-motion for summary judgment. Sperling's position, both before the district court and on appeal, is that the administrative record leaves no fact issue as to a showing of the government's discrimination against him, and hence entitlement to relief. If, however, this court concludes that there is a fact issue as to discrimination, Sperling's position is that he is entitled to a *de novo* hearing in the district court on that issue. In the alternative, he is agreeable to having the determination made on the administrative agency record without an additional evidentiary hearing. The government's position

before the district court, and on appeal, is (1) that the decision of the Board of Appeals of the Civil Service Commission is final; or (2) that if there is any judicial review it is limited to a determination that administrative due process had been afforded; or (3) that if any factual review is permitted it is limited to determining whether substantial evidence in the administrative record as a whole supports the Commission's findings.

The district court concluded that it had jurisdiction under the Tucker Act, but that the scope of judicial review available under that jurisdictional grant was limited to determining whether substantial evidence supported the Commission's findings.[4] Alternatively, it held that if the suit was cognizable under § 717(c) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(c), which the government disputed, its scope of review was limited to determining whether administrative due process was afforded by the agency.[5]

---

[4] The court wrote:

> "Regardless of whether the allegations of plaintiff are based on discrimination or simply failure to follow appropriate administrative regulations, there is substantial evidence to support the Civil Service Commission finding that the plaintiff was not improperly denied promotional opportunity and that the action of the agency was not arbitrary or capricious." (5 App. at 1267).

The district court probably erred in concluding that it had Tucker Act jurisdiction, since 28 U.S.C. § 1346(a)(2) limits that jurisdiction to claims not exceeding $10,000. Sperling's claim appears to exceed that amount even without regard to the prayer for counsel fees.

[5] The court wrote:

> "However, the scope of review for claims of discrimination in federal employment based on 42 U.S.C. Sec. 2000e-2 *et seq.*, Executive Order 11491 and presumably Executive Order 11478 is even more limited. Assuming arguendo that plaintiff's claim is cognizable under either the Equal Opportunity Act, 42 U.S.C. Sec. 2000(e), *et seq.* and (or) Executive Order 11478, this court need only determine whether administrative

The 1972 Act

The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, extensively revised the employment discrimination provisions of Title VII of the Civil Rights Act of 1964.[6] The 1972 Act added a new § 717 to Title VII making it clear that the federal government is obligated to insure that all personnel actions be free from discrimination based on race, color, religion, sex or national origin, § 717(a); vesting in the United States Civil Service Commission the authority to enforce these prohibitions by appropriate remedies and through its rule-making power, § 717(b); and affording to persons aggrieved, a civil remedy in the district courts, § 717(c).[7] The interrelationship of § 717 with existing remedies for public and private employment discrimination, the cross-reference in § 717(d) to other provisions in Title VII,[8] and the legislative compromises in Congress which resulted in the present language, coincide to produce an unusually difficult complex of problems in statutory interpretation.

An appropriate starting point is the framework of Title VII of the Civil Rights Act of 1964. As enacted, Title VII did not extend to employment in the federal government,[9]

due process has been accorded to the alleged discriminatee, i.e. whether a fair and open hearing with the right of confrontation and cross-examination was accorded on the discrimination charges." (5 App. at 1267-68).

[6] Pub. L. No. 88-352, 42 U.S.C. § 2000e *et seq.*

[7] See notes 1-3 *infra.*

[8] See note 3 *infra.*

[9] The definition in 42 U.S.C. § 2000e(b) specifically excluded the federal government from coverage:

> "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1)

but rather afforded a civil remedy in the district courts to victims of discrimination in the private sector once conciliation of their claims had been sought with the Equal Employment Opportunity Commission (EEOC).[10] However, the EEOC was given no authority to seek judicial enforcement of these conciliation agreements. Absent some means of enforcement, the EEOC, in the eyes of many members of Congress, failed even to come close to achieving the Act's goal of eliminating employment discrimination in the private sector. Those Congressmen advocating a strengthened EEOC pressed for a cease and desist enforcement authority to be vested in the Commission. However, out of compromise, the 1972 Act amending Title VII authorized only judicial enforcement of EEOC orders,[11] while preserving the existing civil remedy for an aggrieved private sector employee in the district court.[12]

Congress, in considering the amendment of Title VII, was also concerned with discrimination in public employment. Although Title VII of the 1964 Act had not been extended to federal employees, a number of other statutory provisions,[13] Executive Orders,[14] and Civil Service Com-

the United States, a corporation wholly owned by the government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5)...."

[10] Act of July 2, 1964, Pub. L. No. 88-352, § 706(a)-(k), 78 Stat. 259-61.

[11] § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1), *formerly,* Pub. L. No. 88-532, § 706(e), 78 Stat. 260. Both the original Senate and House proposals would have vested a cease and desist authority in the EEOC. See notes 54 and 60 *infra.*

[12] § 706(f)(1)-(5), 42 U.S.C. § 2000e-5(f)(1)-(5).

[13] *E.g.,* Federal Antidiscrimination in Employment Act, 5 U.S.C. § 7151 *et seq.* Section 7151 provides:

> "It is the policy of the United States to insure equal employment opportunities for employees without discrimination

mission regulations, [15] all of which were in force by 1972, had already prohibited discrimination in such employment on account of race, color, religion, sex or national origin. There was, moreover, a longstanding back pay remedy available to federal workers.[16] Despite these provisions, the House Committee charged with the responsibility of preparing a revision of Title VII concluded that progress in eliminating discrimination in federal employment had been "far from satisfactory."[17] It attributed such lack of progress to structural defects in the procedures which the gov-

---

because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy."

In addition, the prohibition against discrimination by the federal government based upon the due process clause of the fifth amendment was judicially recognized in Bolling v. Sharpe, 347 U.S. 497 (1954).

[14] A policy of antidiscrimination in government employment has been assured by a series of Executive Orders dating back at least to 1948. See Exec. Order 9980, 3 C.F.R. 720 (1948) [1943-48 Comp.]; Exec. Order 10590, 3 C.F.R. 237 (1955) [1954-58 Comp.]; Exec. Order 10925, 3 C.F.R. 448 (1961) [1959-63 Comp.]; Exec. Order 11246, 3 C.F.R. 339 (1965) [1964-65 Comp.]. Exec. Order 11478, 3 C.F.R. 803 (1969) [1966-70 Comp.], reported in 42 U.S.C. § 2000e note, became effective on August 7, 1969. The preamble to the Order states:

> "It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality."

[15] The Civil Service Commission regulations which implemented Executive Order 11478 became effective on January 1, 1971. 5 C.F.R. § 713.201 *et seq.*

[16] Back Pay Act, 5 U.S.C. § 5596.

[17] H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971), reprinted in 2 U.S. Code Cong. & Admin. News 2158 (1972).

ernment regulations established for processing complaints,[18] and to a lack of confidence on the part of federal employees in the performance of the Civil Service Commission.[19] The principal defect in the prior system was that the very same federal agency charged with a discriminatory act conducted its own conciliation, investigation and until recently, its own adjudication of the claim.[20] Appeals

---

[18] "A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment. The defect, which existed under the old complaint procedure, was not corrected by the new complaint process. The new procedure, intended to provide for the informal resolution of complaints, has, in practice, denied employees adequate opportunity for impartial investigation and resolution of complaints." 2 U.S. Code Cong. & Admin. News 2158-59 (1972).

[19] "Testimony reflected a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal employees. Complainants were skeptical of the Civil Service Commission's record in obtaining just resolutions of compaints and adequate remedies. This has discouraged persons from filing complaints with the Commission for fear that it will only result in antagonizing their supervisors and impairing any hope of future advancement.

Aside from the inherent structural defects the Civil Service Commission has been plagued by a general lack of expertise in recognizing and isolating the various forms of discrimination which exist in the system. The revised directives to Federal agencies which the Civil Serivce Commission has issued are inadequate to meet the challenge of eliminating systemic discrimination. . . ." Id. at 2159

[20] "Under the revised procedure, effective July 1, 1969, the agency is still responsible for investigating and judging itself. Although the procedure provides for the appointment of a hearing examiner from an outside agency, the examiner does not have the authority to conduct an independent investigation. Further, the conclusions and findings of the examiner are in the nature of recommendations to the agency head who makes the final agency determination as to whether discrimination exists. Although the complaint procedure provides for an appeal to the Board of Appeals and Review in the

from the final decision of an agency to the Civil Service Commission's Board of Appeals and Review, the House Report concluded, rarely resulted in a reversal of an agency decision.[21] The House Committee on Education and Labor proposed, in H. R. 1746, to eliminate these deficiencies by vesting enforcement of the prohibition against discrimination in federal employment in the EEOC rather than in the Civil Service Commission, and by affording federal employees the same civil remedies which were afforded to employees in the private sector.[22]

While the House was considering H.R. 1746, the Senate Committee on Labor and Public Welfare was considering

---

Civil Service Commission, the record shows that the Board rarely reverses the agency decision.

The system, which permits the Civil Service Commission to sit in judgment over its own practices and procedures which themselves may raise questions of systemic discrimination, creates a built-in conflict-of-interest." *Id.*

[21] *Id.* at 2159.

[22] The House Committee Report stated:

"Accordingly there can exist no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector." 2 U.S. Code Cong. & Admin. News 2158 (1972).

The Committee's version of § 717 provides in part:

"(c) Within thirty days of receipt of notice given under subsection (b), the employee or applicant for employment, if aggrieved by the final disposition of his complaint, may file a civil action as provided in section 715, in which civil action the head of the executive department or agency, or the District of Columbia, as appropriate, shall be respondent.

(d) The provisions of section 715 shall govern civil actions brought hereunder.

(e) All functions of the Civil Service Commission which the Director of the Bureau of the Budget determines relate to nondiscrimination in government employment are transferred to the Equal Employment Opportunity Commission." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 56-57 (1971).

S. 2515, a bill addressed to the same issues. The Senate Report accompanying that bill, while recognizing that progress had been less than satisfactory, was more sanguine about what might be expected from the Civil Service Commission, and proposed to continue the antidiscrimination responsibility vested in the Commission by Executive Order 11478.[23] Despite their differences, however, the Senate Committee on Labor and Public Welfare, and the House Committee on Education and Labor were of like mind about the need for making a civil remedy in the courts available to federal employees who were dissatisfied with administrative review of their claims.[24] The provisions of § 717

---

[23] "The Civil Service Commission's primary responsibility over all personnel matters in the Government does create a built-in conflict of interest for examining the Government's equal employment opportunity program for structural defects which may result in a lack of true equal employment opportunity. Yet, the Committee was persuaded that the Civil Service Commission is sincere in its dedication to the principles of equal employment opportunity enunciated in Executive Order 11478 and that the Commission has the will and desire to overcome any such conflict of interest. In order to assist the Commission in accomplishing its goals and to make clear the Congressional expectation that the Commission will take those further steps which are necessary in order to satisfy the goals of Executive Order 11478, the Committee adopted in Section 707(b) of the bill specific requirements under which the Commission is to function in developing a comprehensive equal employment opportunity program." S. Rep. No. 92-415, 92d Cong., 1st Sess. 15 (1971).

[24] "The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt. The provisions adopted by the committee will enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate. *Aggrieved employees or applicants will also have the full rights available*

with respect to the civil remedy as adopted in the final House and Senate versions are set forth in the margin.[25]

In contrast to the conciliation provisions of the 1964 private civil remedy in Title VII, the House version would have permitted suits in the district court within thirty days of notice of an agency's disposition of claim. Because the House bill would thus have completely by-passed the appeal remedy before the Civil Service Commission's Board of Appeals and Review,[26] the civil remedy in the district court, of necessity, was the same trial *de novo* as in a private employment discrimination case. However, because the Senate Committee proposed to preserve the anti-

---

in the courts as are granted to individuals in the private sector under title VII." Id. at 16 (emphasis supplied).

[25] See note 22 *supra* for the final House version which is identical to its committee's version. 117 Cong. Rec. (1971). The final Senate version provided:

"'(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

'(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.'" 118 Cong. Rec. 4948 (1972).

[26] See note 22 *supra*.

discrimination enforcement authority of the Civil Service Commission, the Senate's version of § 717(c) made reference to the appeal remedy available before the Commission.[27] The Senate Committee report explains what was intended to be accomplished:

> "The bill (section 717(c)) enables the aggrieved Federal employee (or applicant for employment) to file an action in the appropriate U.S. district court after either a final order by his agency or a final order of the Civil Service Commission or an appeal from an agency decision or order in any personnel action in which the issue of discrimination on the basis of race, color, religion, sex or national origin has been raised by the aggrieved person. *It is intended that the employee have the option to go to the appropriate district court* or the District Court for the District of Columbia *after either the final decision within his agency* on his appeal from the personnel action complained of *or after an appropriate appeal to the Civil Service Commission or after the elapse of 180 days* from the filing of the initial complaint or appeal with the Civil Service Commission." (emphasis supplied) [28]

Thus in order to meet the substantial objections to the Civil Service Commission remedy, the Senate proposed to give public sector litigants the *option* of bypassing the Commission and seeking a judicial remedy at the outset. At the same time, those federal employees who had confidence in the Commission could appeal to it, but they would not thereby lose their right to an action in the district court if the Commission's decision was unsatisfactory.

The Conference Committee adopted the Senate's approach,[29] and § 717(c) as enacted, is identical in language

---

[27] See note 25 *supra*.

[28] S. Rep. No. 92-415, 92d Cong., 1st Sess. 16 (1971).

[29] The Conference Report is not enlightening. It states:

"The Senate amendment provided that all personnel ac-

to S. 2515 to which the Senate Report, quoted above, refers. The Senate Report would appear, then, to be the authoritative expression of Congressional intent. As will be developed hereafter, the option as to remedies which § 717(c) plainly affords, significantly bears upon the scope of review issues considered by the district court.

Retroactivity of § 717

Because the acts of discrimination complained of by Sperling took place before March 24, 1972, the effective date of the 1972 amendments, the government disputes the applicability of § 717 to this case. Sperling contends that because the statute is procedural and remedial in nature, it should be given retroactive application. Thus, since the administrative proceeding in his case was still pending on the effective date of the amendments, and was not concluded until July 15, 1972, Sperling urges that he is entitled to the civil remedy that § 717(c) affords. The question of the retroactivity of § 717 has already generated extensive liti-

---

tions involving Federal employees be free from discrimination. This policy was to be enforced by the United States Civil Service Commission. Each agency of the Federal Government would be responsible for establishing an internal grievance procedure and programs to train personnel so as to enable them to advance under the supervision of the Civil Service Commission. If final action had been taken by an agency or the Civil Service Commission, an aggrieved party could bring a civil action under the provisions of section 706. The House bill did not cover Federal employees. The House receded. In providing the statutory basis for such appeal or court access, it is not the intent of the Committee to subordinate any discretionary authority or final judgment now reposed in agency heads by, or under statute for national security reasons in the interests of the United States." S. Rep. No. 92-681, 92d Cong. 2d Sess. (1972), reprinted in 2 U.S. Code & Cong. Admin. News 2185 (1972).

This discussion actually misstates the thrust of the House bill. It confirms however, that the Senate version of § 717(c) was adopted. The Conference Report's version of § 717(c) is identical with that of the Act's. See S. Rep. No. 92-681, 92d Cong., 2d Sess. 11 (1972).

gation. The Second,[30] Fourth [31] and District of Columbia [32] Circuits have given the Act retroactive application. The Sixth Circuit, reasoning that waivers of sovereign immunity should be strictly construed, has held that it should have prospective application only.[33] However, long before the enactment of § 717, the Third Circuit had concluded that other jurisdictional grants waived the federal government's sovereign immunity as a bar to the review of federal employment decisions.[34] A back pay award was available against the federal government before the enactment of § 717. See Back Pay Act of 1966, 5 U.S.C. § 5596. That statute as well as several of its predecessors which were to like effect have been held to apply retroactively.[35]

We do not find the Sixth Circuit's sovereign immunity rationale for prospective application of § 717 persuasive in light of the longstanding waiver of immunity in the federal employment context. Whatever little may be said in support of a rule of strict construction of waivers of sovereign immunity in new fields, nothing can be said in favor of strict construction of a waiver in a field where it has

---

[30] Brown v. Gen. Servs. Admin., 8 F.E.P. Cas. 1299 (2d Cir. 1974), *pet. for cert. filed*, 43 U.S.L.W. 3430 (U.S. Dec. 20, 1974) [References to "F.E.P. Cas." where cited, are to the Bureau of National Affairs' Fair Employment Practices Service].

[31] Koger v. Ball, 497 F.2d 702 (4th Cir. 1974).

[32] Womack v. Lynn, 8 F.E.P. Cas. 844 (D.C. Cir. 1974).

[33] Place v. Weinberger, 497 F.2d 412 (6th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3306 (U.S. Nov. 25, 1974).

[34] *Compare* Chaudoin v. Atkinson, 494 F.2d 1323 (3d Cir. 1974); Iannarelli v. Morton, 463 F.2d 179 (3d Cir. 1972); Rosenman v. Levbarg, 435 F.2d 1286 (3d Cir. 1970); DeLong v. Hampton, 422 F.2d 21 (3d Cir. 1970); Charlton v. United States, 412 F.2d 390 (3d Cir. 1969), *with* Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970); Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965).

[35] Koger v. Ball, 497 F.2d 702, 705 (4th Cir. 1974).

long existed. No other reason has been suggested for a prospective application of § 717, and we find Judge Butzner's analysis in the Fourth Circuit's decision, persuasive. He points to the legislative history of the statute, which indicates that Congress did not need to create new substantive rights for federal employees when it enacted § 717. Rather, Judge Butzner reasons that this provision was designed only to make judicial enforcement of longstanding federal substantive policies against employment discrimination more certain and more effective than in the past. Section 717, he concludes, is a classic example of a procedural or remedial statute applicable to cases pending at the time of enactment.[36] We agree with Judge Butzner and with those circuits which have held that § 717 applies to actions where an administrative claim was pending at the time of its enactment. Literally the statute applies to the case *sub judice*, since Sperling's suit was filed within thirty days of his receipt of notice of the Commission's action. Being procedural and remedial in nature, the Act governs the claims disposed of by that administrative decision.[37]

Scope of Judicial Review

The district court, while expressing doubt as to the applicability of § 717, concluded in the alternative that judicial review under the Act was limited to determining whether or not administrative due process had been afforded.[38] Neither the text of the statute nor any clues which may be divined from its legislative history support such a conclusion. The proper role of the district court in a § 717 case has, like the retroactivity issue, produced

[36] *Id.* at 706.

[37] Thus the district court had jurisdiction under 42 U.S.C. § 2000e-5(f)(3) to consider Sperling's § 717 claim for relief. We need not decide whether, and to what extent, that jurisdictional grant duplicates those in 28 U.S.C. §§ 1331, 1343(4).

[38] See note 5 *supra*.

abundant litigation.[39] None of the cases recommend themselves to us as a completely satisfactory explanation of

[39] The decisions are in conflict as to whether § 717(c) requires a trial *de novo* in the district court. Those courts which have found such a remedy in the Act have tended to be located in areas where government installations are few, and where as a consequence, § 717 litigation has been light. *E.g.*, Hunt v. Schlesinger, 10 F.E.P. Cas. 52 (W.D. Tenn. 1974); Robinson v. Klassen, 9 F.E.P. Cas. 84 (E.D. Ark. 1974); Griffin v. Postal Serv., 385 U.S. 274 (M.D. Fla. 1973); Jackson v. Civ. Serv. Comm., 379 F. Supp. 589 (S.D. Texas 1973). However, a district court in the Southern District of New York, faced with a potentially large number of litiginous federal employees has also held in favor of a trial *de novo*. Henderson v. Defense Contract Admin. Servs. Region, 370 F. Supp. 180 (S.D. N.Y. 1973). In addition Judge Wollenberg writing in Thompson v. Dept. of Justice, 360 F. Supp. 255 (N.D. Cal. 1973), had originally decided that the Act required a trial *de novo*, and then reversed his position, accepting the contrary view espoused principally by the courts in the District of Columbia Circuit. Thompson v. Dept. of Justice, 372 F. Supp. 762 (N.D. Cal. 1974). *See also* McLaughlin v. Callaway, 10 F.E.P. 135 (S.D. Ala. 1974) (finding a discretionary right to a trial *de novo*).

Judge Gesell's opinion in Hackley v. Johnson, 360 F.Supp. 1247 (D.D.C. 1973), *appeal docketed*, No. 73-2072 (D.C. Cir., Sept. 7, 1973), is the leading decision rejecting a *trial de novo* in all cases brought under § 717(c). The District of Columbia of course has the highest concentration of federal employees anywhere in the nation, and Judge Gesell noted that a brief review of the civil docket of the District Court for the District of Columbia revealed no less than nineteen § 717(c) claims awaiting disposition at the time *Hackley* was decided. 360 F.Supp. at 1249 n.2.

The only circuit decision to have reached this issue agreed with Judge Gesell's position. Salone v. United States, 10 F.E.P. 1 (10th Cir. 1975). Other district court opinions which have followed his lead include Allen v. Veterans Admin, 10 F.E.P. Cas. 195 (W.D. Pa. 1974); Baca v. Butz, 376 F. Supp. 1005 (D.N.M. 1974); Cates v. Johnson, Civ. Act. No. 73-983 (W.D. Pa., July 18, 1974), *appeal docketed*, No. 74-2079 (3d Cir. 1974); Eastland v. TVA, 8 F.E.P. Cas. 1226 (N.D. Ala. 1974); Ficklin v. Sabatini, 9 F.E.P. Cas. 70 (E.D. Pa. 1974); Guilday v. Dept. of Justice, 385 F. Supp. 1096 (D.Del. 1974); Haire v. Callaway, 9 F.E.P. Cas. 168 (E.D. Mo. 1974); Handy v. Gayler, 364 F.Supp. 676 (D.Md. 1973); Johnson v. Postal Serv., 364 F.Supp. 37 (N.D. Fla. 1973), *aff'd per curiam*,

the district court's role in § 717 cases. Many proceed on the assumption that no real change in the role of the judiciary was intended. But that approach simply belies the plain language of the statute. Section 717(d) provides:

> "The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder."

Section 706(f) through (k), 42 U.S.C. § 2000e-5(f)-(k), set forth the remedies available in the district court to private litigants in non-federal employment. The Supreme Court has held that actions by private litigants under § 706 are considered *de novo* in the district court even if they follow EEOC proceedings.[40] Indeed the language of § 706 hardly admits of any other interpretation. Thus § 706(f) provides:

> "(4) It shall be the duty of the Chief Judge of the district . . . to designate a judge in such district to *hear and determine* the case.
>
> . . . .
>
> (5) It shall be the duty of the judge designated . . . . . *to assign the case for hearing* at the earliest practicable date . . . ." (emphasis supplied)

and § 706(g) provides:

> "If the court *finds* that the respondent has intentionally engaged in or is intentionally engaging in an

497 F.2d 128 (5th Cir. 1974); Pointer v. Sampson, 62 F.R.D. 689 (D.D.C. 1974); Pendleton v. Schlesinger, 8 F.E.P. 853 (D.D.C. 1974); Roberts v. Mumford, 8 F.E.P. Cas. 1195 (D.D.C. 1974); Rooney v. Saxbe, 8 F.E.P. Cas. 933 (D.D.C. 1974); Smith v. Snyder, 381 F.Supp. 1083 (E.D. Pa. 1974); Spencer v. Schlesinger, 374 F.Supp. 840 (D.D.C. 1974).

Outside of the District of Columbia, the opinions would appear to be about evenly divided on the issue.

[40] *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Fekete v. U.S. Steel Corp., 424 F.2d 331 (3d Cir. 1970).

> unlawful employment practice . . . [it] may enjoin the respondent . . . ." (emphasis supplied)

Certainly nothing in § 706 suggests any role for the district court other than that of making an independent factual determination of the alleged fact of employment discrimination. There is no restrictive language such as is found in 28 U.S.C. § 2347(a) dealing with the review of final administrative agency orders, or in 5 U.S.C. § 702 *et seq.* dealing with district court review of agency adjudications. If the district court's role in § 717(c) federal employment discrimination cases is other than *de novo*, the limitation must be found elsewhere than in the remedy provisions of § 706.

Section 717 itself is the only other provision to which we have been referred that purportedly limits the district court's role. Although a number of district courts, and at least one circuit court,[41] claim to have found a limitation of the district court's § 706 jurisdiction in § 717 (or have merely assumed it) we have great difficulty with this approach. Our hesitancy in accepting that analysis is attributable to the fact that in some § 717(c) cases the trial in the district court *must* be *de novo*. Section 717(c) provides that if a discrimination charge is filed with the employing agency by a federal employee, and the agency has not made a final disposition of the complaint within 180 days, the employees may then file suit in the district court. Obviously in such a suit, one would have to make a record in the district court upon which the court could then adduce the facts concerning the claim. From this class of § 717(c) cases we move to the situation where the employing agency has already processed and rejected a discrimination claim. Here, the plain language of § 717(c) itself, as well as the Senate Report's discussion of that provision,[42] make clear

[41] Salone v. United States, 10 F.E.P. 1 (10th Cir. 1975). See note 39 *supra*, for a listing of these decisions.

[42] See text accompanying note 28 *supra*.

that the employee has the *option* of filing suit in the district court *or* appealing to the Civil Service Commission.[43] If suit has been filed the record made by the employing agency would, at a minimum, be evidentiary in the district court. In some cases summary judgment, pursuant to Rule 56 Fed. R. Civ. P., would undoubtedly be appropriate.

If the aggrieved federal employee selects the second option, appeals to the Civil Service Commission, and then seeks a private civil remedy, the only statutory reference to the district court's role is the cross-reference quoted above in § 717(d) to the provisions in § 706(f) through (k) "as applicable." Those courts which have concluded that a trial *de novo* is not available in a case where an appeal has been taken to the Commission have found room for that construction in the use of the words "as applicable."[44] It is difficult to comprehend how those words can support that construction. Such a reading would seem to imply that there are some cases where all of § 706, including even the jurisdictional grant in § 706(f)(3), might not be applicable.[45] Yet the same courts which have said that trial

[43] In Brown v. Gen. Servs. Admin., 8 F.E.P. Cas. 1299 (2d Cir. 1974), *pet. for cert. filed*, 43 U.S.L.W. 3430 (U.S. Dec. 20, 1974), the Second Circuit suggests that a federal employee must exhaust the remedy of an appeal to the Civil Service Commission's Board of Appeals and Review before being permitted to file a § 717(c) suit. Compare the several views expressed on that issue in Perm v. Schlesinger, 490 F.2d 700 (5th Cir. 1973).

We are unable to see how such an exhaustion rule can be imposed in the face of the express provisions in § 717(c), and in light of the language of the Senate Report. See text accompanying note 28 *supra*.

[44] See cases in note 39 *supra*.

[45] Section 706(f)(3), 42 U.S.C. § 2000e-5(f)(3) provides:

> "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought."

de novo is not available where an agency record has been made and appeal taken to the Commission, have assumed jurisdiction under § 706(f)(3). There is no language in § 706(f) which can be relied upon to exclude a trial *de novo* in any case. If the "as applicable" language were intended to exclude a trial *de novo* in all cases where an agency record was made, it would have to be so because the § 706 civil action remedy was somehow inapplicable, and therefore judicial review dependant upon some other remedy and statutory grant of jurisdiction.

More significantly, the inclusion of the words "as applicable" in § 717(d) could not have had any reference to the existence of a Civil Service Commission appeal procedure, since the "as applicable" language was included in the Senate bill S. 2515 long before the decision was made in the Senate Committee to amend the original version of the bill and provide for a CSC role in discrimination.[46] Neither under Title VII as enacted in 1964, nor under any version of the 1972 proposed amendments was it ever contemplated that action by the EEOC would deprive a private sector litigant of a trial *de novo*. If the words "as applicable" were not so intended when the bill was referred to the EEOC, there is no reason to conclude that they took on a new meaning when the CSC was substituted for the EEOC with respect to federal employees.[47]

[46] See notes 61 to 65 *infra* accompanying text.

[47] See notes 60 and 61 *infra* and accompanying text. By way of

With the exception of the first class of § 717(c) cases discussed above, in which a federal employing agency failed to act on a complaint for 180 days and thereby necessitated judicial fact-finding in a *de novo* proceeding in the district court, a construction limiting the district court's role to review of the administrative record would leave the law concerning the judicial review of federal agency employment decisions exactly where it was before a § 717 was enacted, at least in circuits such as ours, which did not recognize a sovereign immunity bar to judicial review.[48] In the other actions referrable to the district court pursuant to § 717(c) there would be at least a record of fact-finding made by the employing agency, and in the situation where an appeal was taken to the CSC, the record made by the Board of Appeal and Review as well. It takes we think, a strained reading of § 717(c) to suggest that in three of the four situations in which a suit is explicitly permitted, Congress intended no advance beyond the existing law.

The leading case limiting aggrieved public employees to district court review based on the administrative record in a § 717(c) suit, rather than granting a trial *de novo* is Judge Gesell's decision in *Hackley* v. *Johnson*.[49] This

---

contrast, the House version as reported out of committee included no words of limitation in § 717(d). See note 22 *supra*.

The Conference Report states:

> "The provisions of sections 706(f) through (k), concerning private civil actions by aggrieved persons, are made applicable to aggrieved Federal employees or applicants for employment. . . ." Conference Report, S.Rep. No. 92-681, 92d Cong., 2d Sess. (1972), reprinted in Senate Comm. on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 1851 (Comm. Print 1972).

[48] See cases in note 34 *supra*. In circuits such as the Eighth, which barred judicial review on sovereign immunity grounds, it could be argued that § 717(c) was a waiver which permitted conventional review pursuant to other statutes in cases where § 717 was not applicable.

[49] 360 F.Supp. 1247 (D.D.C. 1973), *appeal docketed*, No. 73-2072

opinion, oft-quoted as a result of the concentration of § 717(c) litigation in the District of Columbia Circuit, concludes that it was not the congressional intent to provide a *de novo* trial in all such proceedings.[50] In so holding, *Hackley* misreads the Act's legislative history.

The House was the first branch of Congress to move on its version of the Act. On June 21, 1971, H.R. 1746, a bill entitled the "Equal Employment Opportunities Enforcement Act of 1971" was reported out of the House Committee on Education and Labor without amendment and with a recommendation for its passage.[51] As we have already noted, the House Report was highly critical of the Civil Service Commission's performance in eliminating discrimination in federal employment, and sought to correct this deficiency by transferring its enforcement functions to the EEOC.[52] And as already noted, the bill extended Title VII for the first time to federal employees by providing for a private civil remedy in the district courts.[53] However,

---

(D.C. Cir., Sept. 7, 1973). See discussion of case law in note 39 *supra*.

[50] 360 F.Supp. at 1250-52.

[51] H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 1 (1971). The House Committee's Report is reprinted in 2 U.S. Code Cong. & Admin. News 2137 (1972).

[52] The House Committee's version of § 717(b) provided:

> "The Equal Employment Opportunity Commission shall have authority to enforce the provision of subsection (a) and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities hereunder, and the head of each executive department and agency and the appropriate officers of the District of Columbia shall comply with such rules, regulations, orders, and instructions; Provided, That such rules and regulations shall provide that an employee or applicant for employment shall be notified of any final action taken on any complaint filed by him thereunder."
>
> H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 56 (1971).

[53] See note 22 *supra*.

the principal feature of H.R. 1746 was its provision for a judicially enforceable cease and desist authority to be vested in the EEOC.[54] It was this latter provision which sparked the most controversy when the bill was brought to the House floor for debate on September 15, 1971.

Opponents of the committee bill argued that the EEOC's cease and desist authority denied due process safeguards to private employers. They urged instead House passage of H.R. 9247 as an amendment in the nature of a substitute to H.R. 1746.[55] The "Erlenborn substitute," as it was called, proposed transferring enforcement powers to the courts rather than vesting the EEOC with a cease and desist power.[56] Following a second day of debate on Septem-

---

[54] The House Committee's version of § 706(h) provided in part:

> "If the Commission finds that the respondent has engaged in an unlawful employment practice, the Commission shall state its findings of fact and shall issue and cause to be served on the respondent and the person or persons aggrieved by such unlawful employment practice an order requiring the respondent to cease and desist from such unlawful employment practice and to take such affirmative action, including reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), as will effectuate the policies of this title . . . ."

117 Cong. Rec. 31982 (1971).

[55] The first day of debate of the bill on the floor of the House including the discussion of the "Erlenborn substitute" is found in 117 Cong. Rec. 31958-85 (1971).

[56] The "Erlenborn substitute" version of § 706(h) provided in part:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or

ber 16, 1971, the House voted 202-197 to consider H.R. 1746 as amended by the Erlenborn substitute,[57] and finally passed the bill in that amended form by a vote of 285 to 108.[58]

Two days earlier, the Senate version of the bill, S. 2515, was introduced on the floor of the Senate in behalf of its cosponsors, Senators Williams of New Jersey and Kennedy of Massachusetts, and then referred to the Senate's Committee on Labor and Public Welfare for study.[59] Like the original version of the House bill, S. 2515 sought to provide the EEOC with a method of enforcing the rights of private sector employees who had been subjcted to unlawful employment practices. And like the House's Committee bill, the key feature of the Senate version was a cease and desist authority vested in the EEOC.[60] The bill, as referred to committee, extended Title VII coverage to federal employees with enforcement authority in the EEOC, and provided for a private civil action in the district courts for aggrieved employees.[61]

> labor organization, as the case may be, responsible for the unlawful employment practice)."

117 Cong. Rec. 31980 (1971).

[57] *Id.* at 32111-12.

[58] *Id.* at 32113.

[59] *Id.* at 31711.

[60] The original version of § 717(h) as referred to the Senate Committee provided in part:

> "If the Commission finds that the respondent has engaged in an unlawful employment practice, the Commission shall state its findings of fact and shall issue and cause to be served on the respondent and the person or persons aggrieved by such unlawful employment practice an order requiring the respondent to cease and desist from such unlawful practice and to take such affirmative action, including reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organizations, as the case may be, responsible for the unlawful employment practice), as will effectuate the policies of this title . . . ."

117 Cong. Rec. 31712 (1971).

[61] 117 Cong. Rec. 31715 (1971). Section 717(b)-(d) as referred

On October 28, 1971 the Senate Committee on Labor and Public Welfare reported out S. 2515 favorably, and recommended its passage subject to an amendment which extensively altered the § 717 proposal.[62] At the time the bill had been originally introduced to the Senate, Senator Kennedy as one of its cosponsors, had expressed concern over the bill's transfer of all equal employment opportunity functions from the Civil Service Commission to the EEOC. He opposed the transfer on two grounds: that the EEOC was already overworked in processing private sector claims, and that it was unwise to place the nation's entire equal

---

to the Senate Committee provides:

> "(b) The Equal Employment Opportunity Commission shall have authority to enforce the provision of subsection (a) and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities hereunder, and the head of each executive department and agency and the appropriate officers of the District of Columbia shall comply with such rules, regulations, orders, and instructions: *Provided*, That such rules and regulations shall provide that an employee or applicant for employment shall be notified of any final action on any complaint filed by him thereunder.
>
> (c) Within thirty days of receipt of notice, given pursuant to subsection (b), of final action taken on a complaint of discrimination based on race, color, religion, sex, or national origin, or after ninety days from the filing of the initial charge until such time as final action may be taken, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706(q), in which civil action the head of the executive department or agency, or the District of Columbia, as appropriate, shall be the respondent.
>
> (d) The provisions of section 706(q) through (w), as applicable, shall govern civil actions brought hereunder."

117 Cong. Rec. 31715 (1971).

[62] S. Rep. No. 92-415, 92d Cong., 1st Sess. 1 (1971).

opportunity effort in a single agency's hands.[63] As a result, an amended version of § 717 was added in committee at the behest of the bipartisan efforts of Senator Kennedy and Senators Cranston of California and Dominick of Colorado.[64] Both the Report, as it relates to a continuing Civil Service Commission role, and the Senate committee version of § 717(c), have already been set out in the margin.[65] Because the Senate was preoccupied with other pressing legislative matters, however, debate on the floor was delayed until the new year.

On January 18, 1972, the Senate Committee's version of S. 2515 was brought to the floor. It will be recalled that the House had already voted against a cease and desist authority in the EEOC in approving their version of the bill.[66] The Senate after four weeks of lengthy debate, followed suit and adopted the so-called "Dominick amendment" which also substituted EEOC enforcement through the courts.[67] However, opponents of the bill, led by Senator Allen of Alabama, continued to filibuster against its passage, even after the Senate's approval of the Dominick amendment.[68] On February 22, 1972, following two unsuccessful attempts at cloture, two-thirds of the Senate voted to limit further debate.[69] Before finally voting on S. 2515, the bill's sponsors attempted to provide their colleagues with an analysis of its salient features. It is at

---

[63] 117 Cong. Rec. 31718 (1971).

[64] 118 Cong. Rec. 4921 (1972) (Remarks of Senator Cranston).

[65] See notes 23 and 25 *supra*. The final Senate version as quoted in note 25 *supra* is identical to the amended version reported out by the Senate Committee. *Compare* S. Rep. No. 92-415, 92d Cong., 1st Sess. 72 (1971), *with* 118 Cong. Rec. 4948 (1972).

[66] See text accompanying notes 55-58 *supra*.

[67] 118 Cong. Rec. 4907 (1972).

[68] *Id.* at 4907-08 (Remarks of Senators Allen and Williams).

[69] *Id.* at 4911-12.

this point, that the legislative history presents some difficulties.

Senator Williams, one of the bill's original sponsors, and its manager on the floor provided a summary of § 717(c):

> "Finally, written expressly into the law is a provision enabling an aggrieved Federal employee to file an action in U.S. District Court for a review of the administrative proceeding record after a final order by his agency or by the Civil Service Commission, if he is dissatisfied with that decision. Previously, there have been unrealistically high barriers which prevented or discouraged a Federal employee from taking a case to court. This will no longer be the case. There is no reason why a Federal employee should not have the same private right of action enjoyed by individuals in the private sector, and I believe that the committee has acted wisely in this regard."[70]

In support of his statement, Senator Williams had a more lengthy analysis printed in the *Record*. This analysis was taken almost verbatim from the Senate Committee Report. There were however, some alterations of language which are significant for our purposes. We have set out the Williams analysis side-by-side with the Committee analysis in the margin to indicate these alterations, placing in brackets, and italicizing that wording in the Williams analysis which differs from the Committee's version.[71] It would appear that the subtle change in nuance, quite clearly reflected in Senator Williams' alterations, was intended to emphasize the view that § 717(c) was to provide for only administrative review in the district court. Although deference is due to the Williams analysis in view of his role as cosponsor and floor manager of the bill, we believe the analysis in the Senate Report representing the consensus of the committee charged with studying the bill, more accurately reflects the congressional intent.

That the Senate Report should be regarded as explicative of congressional intent rather than the Williams view, is further demonstrated by Senator Cranston's insertion into the *Record* of the Committee Report's discussion which we

---

[70] *Id.* at 4922.

[71]

Williams Analysis

"An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private right of action [*of review of the agency proceedings*] in the courts by Federal employees who are not satisfied with the Agency or Commission decision.

The testimony of the Civil Service Commission notwithstanding, the Committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt. The provisions adopted by the Committee will enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate. [*Aggrieved employees or applicants will also have the full rights of review available in the courts.*]"

118 Cong. Rec. 4923 (1972).

Senate Committee Report

"An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private right of action in the courts by Federal employees who are not satisfied with the agency or Commission decision.

The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt. The provisions adopted by the committee will enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate. Aggrieved employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under title VII."

S. Rep. No. 92-415, 92d Cong., 1st Sess. 16-17 (1971).

have already quoted in the margin alongside the Williams analysis.[72] Senator Cranston, it will be recalled, had been

[72] 118 Cong. Rec. 4938 (1972). Senator Cranston's position has been less than unequivocal. Judge Gesell, referring to Cranston's remarks as reported in the daily edition of the *Congressional Record* concluded that Cranston had taken a similar position to Williams. 360 F.Supp. at 1252 n.7. However, this conclusion is somewhat misleading. Following Senator Williams' remarks, and before inserting the Committee Report's discussion into the *Record,* 118 Cong. Rec. 4938 (1972), Cranston purportedly made the following remarks concerning the operation of § 717(c):

> "For the first time, [it will] permit Federal employees to sue the Federal Government in discrimination cases—under the theory of Federal sovereign immunity, courts had not generally allowed such suits—and to bring suit either prior to or after CSC review of the agency EEO decision in the case. As with other cases brought under title VII of the Civil Rights Act of 1964, Federal district court review *would be based* on the agency and/or CSC record and would *not be a trial de novo.*" (emphasis supplied).

It was this version of Senator Cranston's remarks which Judge Gesell referred to in *Hackley,* and which was printed in the daily edition of the *Record,* 118 Cong. Rec. S2287 (daily ed. Feb. 22, 1972), and later reprinted in the Senate's compilation of the Act's legislative history. Senate Comm. on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 1744 (Comm. Print 1972).

Almost a year later, and some ten months after passage of the Act, Senator Cranston corrected what he described as an "error" and an "incorrect version" of the statement in the above quote.

> "Unfortunately, Mr. President, the word 'not' was misplaced in the last sentence of the material I just quoted. I have called this to the attention of the appropriate officers, and the bound volume of the CONGRESSIONAL RECORD, which I understand will not be available for almost a year, will set forth this sentence in the correct manner as follows:
>
> > As with other cases brought under title VII of the Civil Rights Act of 1964, Federal district court review *would not be based* on the agency and/or CSC record and *would be a trial de novo.* [emphasis supplied]
>
> I hope that this correction will set the RECORD straight and that my calling attention to it today will avoid any misplaced reliance on the incorrect version as originally printed in the CONGRESSIONAL RECORD of February 22, 1972."

119 Cong. Rec. S1219 (daily ed. Jan. 23, 1973).

This corrected version of the statement indicating a right to a trial *de novo* appears in the final bound volume of the *Record,* 118 Cong. Rec. 4929 (1972), in its appropriate place in the final Senate debate on February 23, 1972. Reference to the correction, however, is not made either at this point in the bound volume, nor is Cranston's statement of correction even included on the corresponding page in the bound volume a year later. See 119 Cong. Rec. 2016 (1973).

Because of the anamolous nature of Senator Cranston's remarks we do not emphasize their importance or place reliance upon them in interpreting the Act's legislative history. However, Cranston's statement as corrected is at least internally consistent with the position set forth in the Senate Committee Report which he had placed in the *Record,* and to that extent cannot be read as supportive of the Williams view. Neither the Williams, nor the Cranston statements can be given the same weight as the Committee Report.

instrumental in amending § 717 while S. 2515 was in committee, and it was the committee's amendment of § 717 which was the version debated on the floor of the Senate. Following the conclusion of debate, the Senate passed the bill by a vote of 73 to 16.[73]

Our reading of the legislative history leads us to the conclusion that it was Congress' intent to provide an ag-

[73] *Id.* at 4944. Following the Senate's passage of S. 2515, the bill went to a conference committee to resolve differences with the House bill, H.R. 1746. After amendment by the conference committee, the final version, which made no changes in § 717 from the final Senate proposal, was reported out to both houses for final passage. Because the House had passed H.R. 1746 before the Senate had acted on its own bill, it was the House bill as amended which was transmitted to Congress for approval. The Senate approved the bill on March 6, 1972, followed by the House on March 8, 1972. The Conference Report is found in S. Rep. No. 92-681, 92d Cong., 2d Sess. (1972), and is reprinted in part in 2 U.S. Code Cong. & Admin. News 2179 (1972).

On March 24, 1972 the Equal Employment Opportunity Act of 1972 took effect.

grieved federal employee with as full a panoply of procedural remedies in the district court as those afforded a private sector litigant. Judge Gesell's reliance in *Hackley* on Senator Williams' statement and analysis of the bill was misplaced; and his conclusion that a trial *de novo* is not mandated was erroneous.[74] We hold therefore that the statutory language of the Act, as well as its legislative history, indicates a right to a trial *de novo* in the district court when suit is brought by an aggrieved federal employee pursuant to § 717(c).

The Plaintiff's Burden

Having concluded that there is no statutory warrant for assigning the district court a different role in a § 717 case on the basis of either the absence or presence of an agency record, and also having concluded that the Act mandates a trial *de novo* in all cases, we next consider the function of the agency record in the district court proceeding. As we have discussed earlier, in most instances a discrimination complaint will have already been the subject of agency review before the aggrieved employee brings suit under § 717(c). In the district court proceeding, as in any civil action, the employee has the burden of proving his allegations of agency discrimination. In this regard the agency record will have evidentiary value. It may well establish that there is no genuine fact issue as to the absence of discrimination. In such a case summary judgment is appropriate. If, however, there is a genuine fact issue, that must be resolved by the district court pursuant to the Federal Rules of Civil Procedure. However, the Federal Rules do not specifically instruct the district court as to

[74] For an analysis of Judge Gesell's opinion see, Comment, *Hackley v. Johnson*: The Federal Employee's Right to Trial De Novo Review of Civil Service Discrimination Determinations, 123 U. Pa. L. Rev. 206 (1974). The author concludes that "a close analysis of the language [of 717(c)] suggests that a trial de novo was intended." *Id.* at 208.

the proper standard of review to be applied to the agency's fact-finding record, nor does the language of § 717(c) itself enlighten us in this regard.

Among those decisions which have considered the appropriate standard of judicial review under § 717(c), the two opinions which most thoughtfully address the problem in the context of an agency record which has rejected a discrimination claim, are those of Judge Gesell in *Hackley* v. *Johnson*,[75] and Judge Caleb Wright in *Guilday* v. *Department of Justice*.[76] Both opinions reject the position that § 717(c) represented no advance beyond the previously existing law. Both reject the contention that the judicial role is limited to "substantial evidence" review in those cases where an agency record exists.[77] They reject, *a fortiori*, the position of the district court in this case that judicial review in a § 717 case is narrower still, being an inquiry limited solely to a consideration of administrative due process.

In *Hackley*, Judge Gesell declined to accept the plaintiff's position that in every § 717(c) case a district court evidentiary hearing was required, and dismissed as well the government's position that the district court was limited to substantial evidence review.

> "The district court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the *clear weight of the evidence* in the record, *no new trial* is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate remand, take testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record." (emphasis supplied).[78]

[75] 360 F. Supp. 1247 (D.D.C. 1973).

[76] 385 F. Supp. 1096 (D.Del. 1974).

[77] 360 F. Supp. at 1252-53; 385 F. Supp. at 1099-1102.

[78] 360 F.Supp. at 1252.

Judge Gesell's approach requires that the district court examine the administrative record and determine if on that record, by the clear weight of the evidence,[79] the government is entitled to a judgment. If not, he suggests, the district court may in its discretion either remand or take further testimony. The more attractive course to hard-pressed district court judges seems obvious.

But remand to whom? If a § 717(c) suit is commenced after an adverse employing agency decision, one would suppose that the remand would properly be to the employing agency. If the suit is commenced after a decision by the Civil Service Commission's Board of Appeals and Review,[80] a remand to it would require a second remand by the Board to the employing agency for the purpose of further fact finding. Entirely aside from the absence of any statutory authority for a district court to direct either a single or a double remand to an executive department agency for the purpose of taking testimony,[81] there is the underlying issue of credibility. The motivational criteria that may color agency decisions on employment or promotion cannot, even in the computer age, be quantified, and motivation is what § 717 is all about. A remand for a decision on motivation, which shields the ultimate trier of fact from a face to face confrontation with those witnesses who were exposed to the events, does not seem consistent with the rather clear policy decision implicit in the enactment of § 717. That

[79] The classic trichotomy is proof beyond a reasonable doubt, clear and convincing proof, or proof by a preponderance of the evidence. It is unclear where the "clear weight" test lies between the reasonable doubt and the preponderance of evidence standards, or whether in fact, it makes any difference.

[80] § 717(c); 5 C.F.R. § 713.231 *et seq.*

[81] Compare with the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* Remand from the district court to the administrative agency is permitted under 5 U.S.C. § 706.

policy decision, it seems to us, was that the executive branch agencies would no longer be the judges of their own motivation.

Judge Wright's opinion in *Guilday* v. *Department of Justice*, also rejects both the plaintiff's position that trial *de novo* is always available, and the government's position that the court's role is limited to substantial evidence review.[82] While relying on *Hackley*, Judge Wright also found authority in Rule 56(c), Fed. R. Civ. P. for rejecting plaintiff's claim to an evidentiary hearing:

> "As a matter of course, the Government—and often the plaintiff—moves for summary judgment based on the administrative record. The court must decide, after reviewing the record, whether there is a genuine issue as to any material fact and whether that movant is entitled to a judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure. Based on this review, the Court either remands for further administrative proceedings, allows the case to go to trial—with the administrative record in evidence—, or grants or denies relief on the administrative record." (footnote omitted)[83]

Judge Wright then proceeded to consider by what standard a district court should review the administrative record, and held that it would require that the "absence of discrimination be established by the preponderance of evidence in the administrative record."[84]

There is no doubt that in appropriate cases summary judgment may be correct. But we do not think that Rule 56(c) can support the kind of hybrid judicial review envisaged by Judge Wright. Our difficulty lies in applying

[82] 385 F. Supp. at 1099-1102.

[83] *Id.* at 1099. See the concluding paragraph of this section, p. 79a *infra.*

[84] *Id.* at 1102.

his proposed standard of review. Consider, hypothetically, a discrimination complaint which turns on credibility. If the agency's hearing examiner makes credibility judgments against the complaining employee, will the district court then defer to those judgments or instead attempt to reach an independent judgment on the basis of a transcript without ever having the benefit of an opportunity to observ the demeanor of the complainant and other witnesses? If the Board of Appeals and Review of the Civil Service Commission, which also reviews on the agency record, has affirmed the hearing examiner's decision, what deference will be given to the Board's decision by the district court in applying the preponderance test? Finally, since in the administrative grievance proceedings the burden presumably is on the employee to establish his grievance,[85] what justification is there, when the matter reaches court, for reviewing the record to see if the government has disproved the grievance by a preponderance of the evidence?

We are well aware that a substantial motivation of those courts which have held that federal employee discrimination claims will be reviewed on the agency record by a substantial evidence standard has been their perception of the deluvian consequences of such lawsuits in the federal judicial system, and of the waste involved in affording both administrative and judicial remedies. Those concerns, while real, are matters properly within the sphere of the legislature. In any event, the federal courts have not been put out of business by Title VII lawsuits from the private sector. Those suits, too, in many cases duplicate grievance-arbitration remedies analogous to the grievance remedies established by federal regulation for government employees. Though the burden imposed on the federal courts by § 717 will be a heavy one, we will, one suspects, remain open for business.

[85] In *Hackley* v. *Johnson, supra,* Judge Gesell appears to have taken the view that a complainant satisfies his or her burden of going forward by introducing any proof suggestive of discrimination.

> "Those who feel aggrieved, once having brought forward any proof suggestive of discrimination, are entitled to require those most cognizable of the relevant employment practices to come forward and disprove the accusation by the clear weight of the evidence."
>
> 360 F. Supp. at 1253.

We believe this view to be incorrect. The burden is on the federal employee to prove his or her discrimination claim by a preponderance of the evidence.

We thus conclude that in the *de novo* proceedings in the district court, the agency record can be reviewed on a motion for sumary judgment by the standard generally applicable under Rule 56, Fed. R. Civ. P.; that is the existence of any genuine issue of fact as to employment discrimination. If such a motion is not granted, the agency record is admissible in evidence at trial when appropriate under the applicable Federal Rules of Civil Procedure and of Evidence. And, as in any other civil action, the aggrieved federal employee must prove his or her discrimination claim by a preponderance of the evidence.

Sperling's Case

Although the district court applied an improper legal standard in deciding the government's motion for summary judgment, a remand by this court would not be necessary if by any standard Sperling could not prevail. Thus we must consider whether § 717 is applicable to Sperling's charge that the government discriminated against him as a consequence of his representation of blacks in grievance discrimination proceedings at Fort Monmouth. The government, without referring us to any authority, but instead relying on the language in § 717(a) that prohibits "discrimination based on race, color, religion, sex, or national origin" in federal employment, argues that the 1972 Act afforded no substantive protection

from reprisal or retaliation to Sperling in his capacity as a *representative* of a black employee claiming discrimination. However, almost identical language appears in 5 U.S.C. § 7151 *et seq.*, which seeks to insure equal employment opportunities to federal employees.[86] Acting pursuant to those provisions, the Civil Service Commission has adopted regulations which provide in pertinent part:

> "Complainants, their *representatives*, and witnesses shall be free from restraint, interference, coercion, discrimination, or reprisal at any state in the presentation and processing of a complaint, including the counseling stage under section 713, or anytime thereafter." (emphasis supplied).[87]

This is a construction of § 7151 *et seq.* by the very agency charged with its administration. The § 717(c) remedy supplements those additional remedies which were made available to federal employees pursuant to 5 U.S.C. § 7151 *et seq.*, and it would be quite illogical to assume a congressional intention that § 717 be read more narrowly. We conclude, therefore, that Sperling's claim of discrimination falls within § 717's ambit.

The government also contends that on the administrative record in this case, which is the only evidence on which Sperling relied, the defendants are entitled under Rule 56 to a summary judgment that he was not discriminated against. We have reviewed the entire record, encompassing six volumes of appendix, and conclude that summary judgment would be inappropriate here because genu-

---

[86] 5 U.S.C. § 7151 provides:

> "It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, or national origin. The President shall use his existing authority to carry out this policy."

The President implemented this policy with his issuance of Executive Order 11478.

[87] 5 C.F.R. § 713.261(a).

ine issues of fact exist as to Sperling's allegations of employment discrimination.

On remand the district court must make an independent determination as to whether the charge of discrimination which was pending at the time of enactment of § 717 has been sustained by a preponderance of the evidence. In making that determination the court will have to consider to what extent evidence relating to prior acts of alleged discrimination are properly considered as evidentiary in support of the pending charge. For example, Sperling traces his ongoing employment difficulties to a highly critical report written by William Biven, an Assistant Deputy Equal Employment Opportunity Officer at Fort Monmouth, with respect to his conduct as the representative of a black complainant in a June, 1967 discrimination hearing. (3 Appendix at 915-40). The report urges that Sperling be disciplined for what Biven characterized as Sperling's "misconduct" as the complainant's representative at the hearing (3 Appendix at 929-36). Whether there is in fact any connection between the Biven report and subsequent decisions on Sperling's promotion is a matter which the district court must consider. Since we are remanding so that it can make an independent factual determination, it is not appropriate for us to express our views on the facts except to hold that summary judgment was improper here.

Finally, as to the request for attorneys fees, such an award may be made only if Sperling prevails below. 42 U.S.C. § 2000e-5(k).

The order of the district court granting summary judgment for the defendants will be reversed and the case remanded for further proceedings consistent with this opinion.

To THE CLERK OF THE COURT

Please file the foregoing opinion.

Circuit Judge

OPINION OF THE TENTH CIRCUIT IN SALONE v UNITED STATES

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

No. 74-1475

ANTHONY M. SALONE, JR., *Appellant,*

v.

UNITED STATES OF AMERICA ET AL., *Appellees*

February 21, 1975

Robert B. Smith, of Miskovsky, Sullivan & Miskovsky, Oklahoma City, Okl., for appellant.

Wiliam R. Burkett, U.S. Atty., and John E. Green, Asst. U.S. Atty., for appellees.

Before LEWIS, *Chief Judge,* and SETH and MCWILLIAMS, *Circuit Judges.*

SETH, *Circuit Judge.*

Appelant Salone is a civilian employee at the Oklahoma City Air Material Area (OCAMA), Tinker Air Force Base, Oklahoma. In April 1972, Salone complained to the Commander of the Tinker AFB that his supervisors were discriminating against him because of his race, and in reprisal for a discrimination complaint filed by him some five years previously. This complaint was referred to the agency's Chief EEO Counselor who interviewed Salone and the witneses and made recommendations. Further complaints, hearings, and recommendations followed, and in March 1973 Salone was notified by the Director of Equal Employment Opportunity, Office of the Secretary of the Air Force, that his allegations of racial discrimination were not supported by the record. The decision of the Director

was affirmed without comment by the Civil Service Commission Board of Appeals and Review.

Having exhausted his administrative remedies through the Civil Service machinery, Salone filed this action in the District Court pursuant to 42 U.S.C. §§ 2000e—16 and 2000e—5. He requested a trial de novo on his allegations of discrimination, rather than a review of the administrative record. Defendant filed a motion for sumary judgment and asking that the action be dismissed for lack of subject matter jurisdiction.

The trial judge found that review of the administrative record was the procedure required, and that the record showed an absence of discrimination. He then granted the motion for summary judgment, and further found an absence of subject matter jurisdiction.

The only issue presented on this appeal is whether a federal employee filing a civil action under 42 U.S.C. § 2000e—16 is entitled to a trial de novo or judicial review of the administrative record. The statute is silent on this question. 42 U.S.C. § 2000e—16(c) provides that a federal employee who has a complaint of discrimination based on race, color, religion, or sex may, within certain time limits, "file a civil action as provided in section 2000e—5 of this title." Section 2000e—5 governs civil actions by private employees. 42 U.S.C § 2000e—16(d) reads: "The provisions of section 2000e—5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."

There is no dispute that a private employee filing an action pursuant to 42 U.S.C. §§ 2000e—5(f) through (k) is entitled to a trial de novo. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. Two early cases applied this holding to actions under 42 U.S.C. § 2000e—16(c) and concluded that the 1972 amendment to the Equal Employment Opportunity Act was intended

to extend to federal employees the same procedure that was available to private employees, and thus a federal employee should be entitled to a trial de novo rather than judicial review of the administrative record. Henderson v. Defense Contract Administration Services Region, New York, 370 F.Supp. 180 (S.D. N.Y.); Thompson v. United States Dep't of Justice, Bureau of Narcotics & Dangerous Drugs, 360 F.Supp. 255 (N.D. Cal.).

A separate line of cases also developed which maintained a distinction between private and federal employees. These cases relied on decisions concerning discharge of federal employees. In such actions, brought under 5 U.S.C. § 701 et seq., a federal employee is entitled only to review by the federal district court of the administrative record. Trials de novo are not provided. Polcover v. Secretary of Treasury, 477 F.2d 1223 (D.C. Cir.), cert. denied, 414 U.S. 1001, 94 S.Ct. 356, 38 L.Ed.2d 237; Rosenman v. Levbarg, 435 F.2d 1286 (3d Cir.); Dabney v. Freeman, 358 F.2d 533 (D.C.Cir.); Gordon v. Bright, 306 F. Supp. 252 (W.D. Okla.), aff'd 419 F.2d 835, cert. denied, 397 U.S. 1057, 90 S.Ct. 1403, 25 L.Ed.2d 674.

In Hackley v. Johnson, 360 F.Supp. 1247 (D.D.C.), the court considered the question whether a federal employee is entitled to a trial de novo after being unsuccessful in administrative agency proceedings on a complaint of employment discrimination. The court considered the history of the 1972 Equal Employment Opportunity Act, the potential burden on the federal judiciary, duplication of the administrative process, prior federal employee discharge cases, and the need for prompt, consistent decisions in discrimination matters, and said: "Viewing the Act and its history broadly, Congress intended to guarantee *access* to the courts—'a civil action'—to eliminate previous barriers but not to start the process anew." Thus the court concluded that the Act provided for "access" but once there a trial de novo was not required under 42 U.S.C. § 2000e—16.

The holding in *Hackley* was followed in Tomlin v. United States Air Force Medical Center, 369 F.Supp. 353 (S.D. Ohio), and Handy v. Gayler, 364 F.Supp. 676 (D.Md.). The district court for the Northern District of California, relying on *Hackley* and *Handy*, reversed its earlier decision in Thompson v. United States Dep't of Justice, Bureau of Narcotics & Dangerous Drugs, *supra*, and held that a trial de novo was not required under 42 U.S.C. § 2000e—16. Thompson v. United States Dep't of Justice, Bureau of Narcotics & Dangerous Drugs, 372 F.Supp. 762, rev'g 360 F.Supp. 255. No decisions by the United States Court of Appeals on this point have been found.

The legislative history is unclear. Senator Williams interpreted the Act as providing only review of agency (Civil Service Commission) proceedings. 118 Cong.Rec. S2280 (daily ed. Feb. 22, 1972) (History at 1727). Senator Cranston originally agreed with Senator Williams, 118 Cong.Rec. S2287 (daily ed. Feb. 22, 1972) (History at 1744). Later he corrected himself and stated that 42 U.S.C. § 2000e—16 provides for a trial de novo. 119 Cong. Rec. S1219 (daily ed. Jan. 23, 1973).

A distinction between federal and private employees is justified for the reasons stated by the court in Hackley v. Johnson, 360 F.Supp. 1274 (D.D.C.), and by the fact that the administrative proceedings relating to Government employees are always handled under the Civil Service system which has developed procedures and standards applicable to such employees. The complaints of the nature here considered should be handled as others, and if they reach the courts, the procedure should be consistent with those under 5 U.S.C. § 701 et seq. Thus there is a valid distinction to be made, and we hold that a de novo hearing is not here required.

The record before us, derived from the Civil Service system hearings and reviews, is detailed, and the facts are thoroughly developed. In the event a trial court should

find a need for additional facts on a particular issue, the matter may be remanded.

Our decision in Nickol v. United States, 501 F.2d 1389 (10th Cir.), was filed shortly after sumary judgment was granted against Salone. And in any event the opinion of the district judge gives sufficient indication of the facts relied on by him from the administrative record to support his conclusions as to the administrative decision.

The order of the district court affirming the decision of the Civil Service Commission Board of Appeals and Review is affirmed.